

University of Dundee

DOCTOR OF PHILOSOPHY

How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May Be interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig Contracts Developed in the United Kingdom, Canada and the United States of America

Ofoegbu, Kelechi

Award date:
2018

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Download date: 04. May. 2023

**How Contractual Risk Allocation Provisions of Oil and Gas Contracts Have Been or May
Be interpreted by an English Court – A Case Study of Some Model Offshore Drilling Rig
Contracts Developed in the United Kingdom, Canada and the United States of America**

By

Kelechi Onyekachi Ofoegbu

A thesis submitted to the University of Dundee

In partial fulfilment for the degree of

DOCTOR OF PHILOSOPHY

Centre for Energy, Petroleum, Mineral Law & Policy

School of Social Sciences

June 2018

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
LIST OF CASES.....	viii
LIST OF LEGISLATION.....	xxiv
DEDICATION.....	xxvi
ACKNOWLEDGMENTS	xxvii
DECLARATION	xxix
ABSTRACT.....	xxx
INTRODUCTION	1
PROBLEM STATEMENT	5
RESEARCH OBJECTIVES	6
RESEARCH QUESTIONS	6
RESEARCH METHODOLOGY.....	7
SCOPE OF THE STUDY	11
ORIGINALITY AND SIGNIFICANCE OF THE STUDY	12
STRUCTURE OF THE THESIS.....	13
Chapter 1.....	18
UNDERSTANDING THE CONCEPTS OF RISK AND RISK MANAGEMENT	18
Introduction.....	18
1.1 ‘Risk’ Contrasted with ‘Uncertainty’, ‘Hazard’ and ‘Probability’	20
1.1.1 Risk and Uncertainty.....	20
1.1.2 Risk and Hazard.....	22
1.1.3 Risk and Probability.....	23
1.2 Classification of Risk	26
1.2.1 Overview of Risks.....	27
1.2.2 Positivist and Constructionist Schools.....	35
1.2.3 Economics School.....	37
1.3 Judicial and Legislative Approaches to Risk	39
1.3.1 Judicial Approach	40
1.3.2 Legislative Approach	41

1.3.3	Economic Approach.....	42
1.3.4	Commentary.....	44
1.4	Risk Allocation as a Risk Management Strategy	46
1.4.1	Definition of ‘Risk Management’	46
1.4.2	Risk Management Process	47
1.4.3	Risk Aversion.....	48
1.4.4	Risk Allocation	49
1.4.5	Risk Acceptance.....	52
1.4.6	Risk Transfer.....	53
1.4.7	Risk Mitigation	54
1.4.8	Insurance as a Risk Management Strategy	55
1.5	Risk Allocation in Offshore Drilling Contracts – Current State	59
1.5.1	Methods of Risk Allocation	59
1.5.2	Parameters of Risk Allocation	61
1.5.3	Negligence/Wilful Misconduct in Risk Allocation.....	63
	Conclusion	65
	Chapter 2.....	68
	THE PETROLEUM FIELD LIFECYCLE AND THE DRILLING CONTRACT	68
	Introduction.....	68
2.1	Phases in the Petroleum Lifecycle	68
2.1.1	Gaining Access	69
2.1.2	Exploration.....	70
2.1.3	Appraisal	70
2.1.4	Development	71
2.1.5	Production	71
2.1.6	Decommissioning	73
2.1.7	Post-Decommissioning	73
2.2	The Drilling Process.....	73
2.3	Incidental Risks	76
2.3.1	Fish Presence	77
2.3.2	Stuck Pipe	77
2.3.3	Formation Damage.....	78
2.3.4	Sloughing Shale	78

2.3.5	Corrosive Gasses.....	79
2.3.6	Kicks and Blowouts	79
2.3.7	Pollution.....	79
2.3.8	Weather	80
2.3.9	Fire	80
2.3.10	Equipment Failure.....	81
2.3.11	Accidents.....	82
2.3.12	Collisions	83
2.4	Risk, Responsibilities and Relationships in a Drilling Contract	84
2.4.1	Drilling Operations	85
2.4.1.1	Provision of the Drilling Unit.....	86
2.4.1.2	Location Preparation and Acceptance of the Drilling Unit	90
2.4.1.3	Provision and Maintenance of Drilling and Other Ancillary Equipment....	91
2.4.1.4	Provision of Personnel and Catering Services.....	93
2.4.1.5	Conduct of Drilling Operations	96
2.4.2	Regulatory Regime and Compliance Requirements	100
2.4.2.1	Licences and Authorisations.....	101
2.4.2.2	Compliance with Health, Safety and Environmental Regulations	102
2.4.2.3	Customs Duties, Fees and Taxes	104
2.4.2.4	Reporting and Compliance Monitoring	105
2.4.3	Third-Party Services, Rights and Benefits.....	107
2.4.3.1	Contracts (Rights of Third Parties) Act 1999	108
2.4.3.2	Intellectual Property Rights and Patents Infringement.....	119
	Conclusion	120
	Chapter 3.....	122
	RISK ALLOCATION BY THE COURTS IN THE ABSENCE OF CONTRACT.....	122
	Introduction.....	122
3.1	Indemnities, Limitation of Liability and Exclusion/Exception Clauses	126
3.1.1	Loss of Life, Bodily Injury and Damage to Property	127
3.1.1.1	Default Position – Where Contract Parties Have Not Allocated Specific Risks	127
3.1.1.2	Whiteacre Undertakes Task X for Blackacre – Without Agreement or Consideration	128

3.1.1.3	Whiteacre Undertakes Task X for Blackacre – With Agreement or Consideration	137
3.1.1.4	Whiteacre Undertakes Task X for Blackacre – Through an Employee or Third Party	139
3.1.1.5	Liability for Death, Injury and Loss/Damage.....	149
3.1.1.6	Contributory Negligence	161
3.1.1.7	Commentary	163
3.1.2	Liability for Pollution	167
Chapter 4	.....	174
CONTRACTUAL RESPONSE BY PARTIES		174
4.1	Mechanisms Utilised by Contract Parties in Response to Risk Allocation by Courts 174	
4.1.1	Structure and Evolution of the Indemnity Clause.....	175
4.1.2	Indemnities and Mutual Hold Harmless	214
4.1.3	Exclusion/Exemption Clause	220
4.1.4	Limitation of Liability.....	226
4.1.5	Liquidated Damages	228
4.1.6	Insurance	232
4.2	Risk Allocation between Parties to a Drilling Contract	235
4.2.1	Risks Typically Assumed by the Operator	237
4.2.1.1	Death of, or Personal Injury to, Operator’s Personnel	238
4.2.1.2	Loss of, or Damage to, Own Equipment	239
4.2.1.3	Loss of, or Damage to, Contractor’s Equipment in Certain Circumstances 240	
4.2.1.4	All Pollution Except Arising from Surface Activities and Contractor Equipment	242
4.2.1.5	Operator’s Consequential Losses	243
4.2.1.6	Wild Well Control Expenditure.....	244
4.2.1.7	Loss of, or Damage to Well, Reservoir or other Subsurface Formation ...	245
4.2.1.8	Third Party Death, Injury or Property Damage Due to Operator’s Negligence 246	
4.2.2	Risks Typically Assumed by the Contractor	249
4.2.2.1	Death of, or Personal Injury to, Contractor’s Personnel.....	249
4.2.2.2	Loss of, or Damage to, Own Equipment including the Drilling Rig.....	251

4.2.2.3	All Pollution Arising from Surface Activities and Contractor Equipment	254
4.2.2.4	Contractor's Consequential Losses	256
4.2.2.5	Third-Party Death, Injury or Property Damage Due to Contractor's Negligence	257
4.2.2.6	Intellectual Property and Patent Infringements	258
4.3	Rationale for the Manner of Risk Allocation between Parties to a Drilling Contract	260
4.3.1	Risk Allocation Rationales based on Industry Practice	260
4.3.1.1	Doctrine of Tradition	261
4.3.1.2	Doctrine of Best Knowledge	263
4.3.1.3	Doctrine of 'Clay Feet'	264
4.3.1.4	Doctrine of Accountability	266
4.3.2	Risk Allocation Rationales based on Legal/Economic Considerations	268
4.3.2.1	Party Best Able to Bear the Risk	268
4.3.2.2	Overall Efficiency Rationale	270
4.3.2.3	Economic Benefit Rationale	272
4.3.2.4	Foreseeability Rationale	273
	Conclusion	274
	Chapter 5	276
	LEGISLATIVE INTERVENTION IN CONTRACTUAL RISK ALLOCATION	276
5.1	Anti-Indemnity Legislation	276
5.2	Unfair Contracts Terms Act, 1977	283
5.2.1	Discussion	285
5.3	Contracts (Rights of Third Parties) Act 1999.....	292
5.4	Supply of Goods and Services Act 1982.....	296
5.5	Other Legislation.....	299
5.5.1	Social Action, Responsibility and Heroism (SARAH) Act 2015	299
5.5.2	Law Reform (Contributory Negligence) Act 1945	300
	Conclusion	302
	Chapter 6.....	308
	RISK ALLOCATION IN OFFSHORE DRILLING MODEL CONTRACTS	308
6.1	Daywork Contracts.....	309
6.1.1	Mobile Drilling Rigs Contract, Edition 1	310
6.1.1.1	Loss or Damage Caused by Subcontractors	311

6.1.1.2	Loss of Income Arising from Inadequate Personnel	312
6.1.1.3	Risk Allocation for Various Events.....	315
6.1.2	International Offshore Daywork Drilling Contract.....	316
6.1.2.1	Loss or Damage Caused by Subcontractors	317
6.1.2.2	Loss of, or Damage to, Own Equipment	319
6.1.2.3	Loss of, or Damage to, Contractor Equipment (Including Drilling Unit) .	322
6.1.2.4	Third-Party Death, Injury or Property Damage.....	323
6.1.2.5	Risk Allocation for Various Events.....	324
6.1.3	CAODC/CAPP Master Daywork Contract.....	326
6.1.3.1	Loss or Damage Caused by Subcontractors	327
6.1.3.2	Risk Allocation for Various Events.....	327
6.1.4	Contract Model of a Major Operator	329
6.1.4.1	Liability for Punitive and Exemplary Damages	330
6.1.4.2	Priority of Insurance for Indemnification	330
6.1.4.3	Indemnification for Gross Negligence	331
6.1.4.4	Risk Allocation for Various Events.....	332
6.2	Turnkey Contracts	333
6.2.1	Offshore Turnkey Drilling Contract – US	335
6.2.1.1	Liability for Non-Workmanlike Performance	336
6.2.1.2	Risk Allocation for Various Events – Irrespective of Turnkey or Daywork Basis	337
6.2.1.3	Risk Allocation for Various Events – Turnkey Basis.....	338
6.3	Footage Contracts.....	339
6.4	Risks Allocation Matrix in Model Drilling Contracts.....	339
Chapter 7	.....	347
COMPARATIVE ANALYSIS AND DISCUSSION	.....	347
7.1	Indemnification for Own Negligence and Gross Negligence	347
7.2	Exclusion of Liability.....	348
7.3	Limitation of Liability	350
7.4	Insurance	351
7.5	Optimality of Risk Allocation	352
CONCLUSION	.....	354
APPENDICES	.....	367

APPENDIX A - Mobile Drilling Rigs Contract, Edition 1	367
APPENDIX B - International Offshore Daywork Drilling Contract.....	396
APPENDIX C - CAODC/CAPP Master Daywork Contract.....	424
APPENDIX D – Contract Model of a Major Operator.....	443
BIBLIOGRAPHY	497

LIST OF CASES

ABRY Partners V, L.P. v F & W Acquisition LLC, 891 A.2d 1032, 1034 (Del. Ch. 2006)

Adams v Ursell (1913) 1 Ch 269

African Export-Import Bank v Shebah Exploration and Production Co Ltd (2018) 1 W.L.R. 487; (2017) 2 Lloyd's Rep. 111

Ailsa Craig Fishing v Malvern Fishing Co (1983) 1 WLR 964

Alderslade v Hendon Laundry Ltd (1945) K.B. 189

Aluminium Company of America v Essex Group, Inc ("ALCOA") 499 F. Supp. 53 (W.D. Pa. 1980)

American Trading & Prod. Corp. v Shell Int'l Marine Ltd, 453 F.2d 939 (2d Cir. 1972)

Am. Motorcycle Ass'n v Superior Court, 578 P.2d 899, 912 (Cal. 1978)

Amoco (UK) Exploration Company v British American Offshore Ltd (2001) All ER (D) 244 (Nov)

Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205

Appleby v Myers (1867) LR 2 CP 251

Argos Ltd v Argos Systems Inc (2017) EWHC 231

Arnold v Britton (2015) UKSC 36, (2015) AC 1619

Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd (2013) EWHC 349 (Comm); (2013) 2 All E.R. (Comm) 97

Atlantic Paper Stock Ltd v St. Anne Nackawic (1976) 1 S.C.R. 580

Attorney General of Belize v Belize Telecom (2009) UKPC 10

‘*A Turtle Offshore*’ (2008) EWHC 3034

Baird v Lease Acquisition Partners, Inc 2000 WL 1508263, 3 (Tex.App.-Austin)

Baker v T.E. Hopkins & Sons Ltd (1959) 1 WLR 966

Bank of Credit and Commerce International v Ali (2002) 1 AC 251

Bank of El Paso v Powell 550 S.W.2d 383, 385 (Tex.Civ.App. 1977)

Bates v Parker (1953) 2 Q.B. 231

Bedfordshire Police Authority v Constable (2009) EWCA Civ 64, (27)

- Benham v Gambling* (1940) 57 T.L.R. 177
- Bernard v Att Gen of Jamaica* (2005) I.R.L.R. 398
- BHP v British Steel* (2000) 2 LLR 277 (CA)
- Biffa Waste Services Ltd and Another v Maschinenfabrik Ernst Hese Gmbh and others* (2008) EWHC 6 (TCC) 169(4)
- Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781
- Boast v Firth* (1864) LR 4 CP 1
- Bolam v Friern Hospital Management Committee* (1957) 2 All ER 118
- Boomer v Atlantic Cement Co.* 257 N.E.2d 870 (N.Y. 1970)
- Bottomley v Todmorden Cricket Club* (2003) EWCA Civ 1041, (2003) Q 443
- Bower v Peate* (1876) 1 QBD 321
- BP Exploration Operating Company Ltd v Dolphin Drilling Ltd* (2009) EWHC 3119 (Comm)
- Braganza (Appellant) v BP Shipping Ltd and another (Respondents)* (2015) UKSC 17
- Brand v Transocean North Sea Ltd* (2011) CSOH 57
- Breaux v Halliburton Energy Servs.*, 562 F.3d 358, 364 (5th Cir. 2009)
- British Railways Board v Herrington* (1972) A.C. 877
- Brown-Quinn & Another v Equity Syndicate Management Ltd & Another* (2011) EWHC 2661
- Bryanston Finance Ltd v de Vries* (1975) QB 703
- BskyB Ltd v HP Enterprise Services UK Ltd (formerly t/a Electronic Data Systems Ltd)* (2010) EWHC 86 (TCC)
- Bull v Devon AHA* (1993) 22 BMLR 79 (CA)
- Burgess v Lejonvarn* (2017) EWCA Civ 254; (2017) B.L.R. 277
- Butterfield v Forrester* (1809) 11 East 60
- Cain v Cleveland Parachute Training Cent.*, 9 Ohio App.3d, 27, 457 N.E.2d 1185 (1983)
- Caledonia North Sea Ltd v London Bridge Engineering Ltd* (2002) UKHL 4
- Callon Petroleum Co v Big Chief Drilling Co.* 548 F.2d 1174 (5th Cir. 1977)

- Camarata Property Inc v Credit Suisse Securities (Europe) Ltd* (2011) EWHC 479
- Canada Steamship Lines Ltd v The King* (1952) 2 D.L.R. 786 (P.C.).
- Candler v Crane, Christmas & Co* (1951) 2 KB 164
- Caparo Industries v Dickman* (1990) 2 AC 605
- Caswell v Powell Duffryn Associated Collieries Ltd* (1940) A.C. 152
- Caudill v Keller Williams Realty, Inc*, 2016 WL 3680033 (7th Cir. July 6, 2016)
- Cavendish Square Holding BV v Talal El Makdessi* (2015) UKSC 67
- Chandler v Webster* (1904) 1 KB 493
- Channel Island Ferries v Sealink UK Ltd* (1988) 1 Lloyd's Rep. 323
- Chanslor-Western Oil & Development Co. v Metropolitan Sanitary Dist. of Greater Chicago*, 131 Ill. App. 2d 527, 266 N.E.2d 405 (1st Dist. 1970)
- Chappell & Co Ltd v Nestle Co Ltd* (1960) AC 87
- Cheltenham & Gloucester Plc v Sun Alliance and London Insurance Plc* (2001) S.C. 965; (2001) S.L.T. 1151
- Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd* (1991) 56 BLR 115
- Chicago, Burlington & Quincy Railroad Co v City of Chicago*, 166 U.S. 226 (1897)
- Cities Serv. Co v Northern Prod. Co* 705 P.2d 321, 329 (Wyo. 1985)
- City of Willoughby Hills v Cincinnati Insurance Co* 9 Ohio St. 3 d 177, 180 (1984)
- Clarke v Price* (1819) 2 Wils. 157
- Clydebank Engineering Co v Don Jose Ramos Yzquierdo y Castaneda* (1905) A.C. 6
- Coco v A N Clark (Engineers) Ltd* (1969) RPC 41
- Codemasters Software Co Ltd v Automobile Club de l'Ouest* (2010) F.S.R. 12; (2009) EWHC 2361 (Ch)
- Cohen v Kite Hill Community Association* 142 Cal.App.3d 642, 191 Cal.Rptr. 209 (1983)
- College Mobile Home Park & Sales, Inc v Hoffman*, 72 Wis.2d 514, 241 N.W.2d 174 (1976)
- Collinge v Heywood* (1839) 9 Ad. & E. 633

Colour Quest Ltd and Others v Total Downstream UK Plc (2009) EWHC 540 (Comm.)

Consult Urban Renewal Dev Corp v T.R. Arnold & Assoc., Inc, CIV A 06-1684 WJM, 2007 WL 1175742 (D.N.J. Apr. 19, 2007)

Corbitt v Diamond M. Drilling Co, 654 F.2d 329, 333 (5th Cir. Unit A Aug. 1981)

Coulson v News Group Newspapers Ltd (2013) 1 Costs L.O. 117; (2013) I.R.L.R. 116

Cox v Robison, 105 Tex. 426, 150 S.W. 1149, 1155 (Tex.1912)

CPC Group v Qatari Diar Real Estate Inv Co (2010) All ER (D) 222 (Jun)

Crawford v Weather Shield Manufacturing, Inc 187 P.3d 424 (Cal. 2008)

Croudace Construction v Cawoods Concrete Products (1978) 2 Lloyds Rep 55 CA

Cruden v Fentham 2 Esp. 685, 170 Eng. Rep.496 (CP. 1798)

Currie v Misa (1875) LR 10 Ex 153

Customs and Excise Commrs v Barclays Bank Plc (2006) UKHL 28, (2007) 1 AC 18

Cutter v Powell (1795) 6 Term Rep. 320

Czarnikow Ltd v Koufos (The Heron II) [1969] 1 AC 350

Darling v Att Gen (1950) 210 L.T. 189

Darty v Transocean Offshore USA, Inc, 875 So. 2d 106, 111-12 (La. App. (4th Cir.) 2004)

Daughdrill v Ocean Drilling & Exploration 665 F. Supp. 477, 481-82 (E.D. La. 1987)

Davies v Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842)

Davis Contractors Ltd v Fareham UDC (1956) AC 696

Dean v Secretary of State for Business, Energy and Industrial Strategy (2017) EWHC 1998 (Admin); (2017) 4 W.L.R. 158

De Beers UK Limited v Atos Origin IT Services (2010) EWHC (TCC)

Deepak Fertilisers and Petrochemicals Corpn v ICI Chemicals & Polymers Ltd [1999] 1 All ER (Comm) 69

De La Bere v Pearson (1908) 1 KB 280

Derr Constr Co v City of Houston, 846 S.W.2d 854, 858 (Tex.App.-Houston [14th Dist.] 1992, no writ)

Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening (2009) 2 Lloyd's Rep 123

Domsalla (t/a Domsalla Building Services) v Dyason (2007) EWHC 1174 (TCC); (2007) B.L.R. 348

Donoghue v Stevenson (1932) AC 562

Dresser Industries, Inc v Page Petroleum, Inc 853 S.W.2d 505, 508 (Tex.,1993)

Dubai Aluminium Co Ltd v Salaam (2002) UKHL 48; (2003) 2 AC 366

Dunlop Pneumatic Tyre Co v New Garage and Motor Co. (1915) A.C. 79, at pp 86-88

Dusek v Stormharbour Securities LLP (2015) EWHC 37 (QB)

Eastern Air Lines, 532 F.2d at 991

Eastwood v Kenyon (1840) 11 Ad & El 438

E.B. Duncan Drilling & Well Servicing Co v Robinson Research, Inc 147 So. 2d 95 (La. Ct. App. 1962)

Edmund Murray Ltd v BSP International Foundations Ltd (1992) Con LR 1

EE Caledonia Ltd v Orbit Valve Co Europe Plc (1995) 1 All ER 174

Egerton v Brown (1853) 4 HLC 1

E.I. Du Pont De Nemours & Co v Shell Oil Co, 259 S.W.3d 800, 805 (Tex.App.2007)

Ellis v Sheffield Gas Consumers Co. (1853) 17 JP 823, 118 ER 955 (KB)

English v BGP Intern, Inc 174 S.W.3d 366 (Tex. App.-Houston [14 Dist.] 2005, no pet. h.)

Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd (2008) VSCA 26

Excelsior Life Insurance Co v Saskatchewan (1987), 63 Sask R 35

Export Credits Guarantee Department v Universal Oil Products Co (1983) 1 W.L.R. 399

Farmers Texas Mutual County Insurance v Griffin, 955 S.W.2d 81, 41 Tex. Sup. Ct. J. 103 (Tex. 1997)

Farstad Supply AS v Enviroco Ltd and Asco UK Ltd [2010] UKSC 18

Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour Ltd (1943) AC 32

Firma C-Trade SA v Newcastle P&I Association (1992) 2 A.C. 1

First Tower Trustees Ltd and another v CDS (Superstores International) Ltd (2017) EWHC 891(Ch)

Flexsys America LP v XL Insurance Co Ltd (2010) Lloyd's Rep. I.R. 132; (2009) EWHC 1115

Flint v Lovell (1935) 1 K.B. 354

Ford v Beech (1848) 11 Q.B.D. 852

Forder v Great Western Railway Co (1905) 2 KB 532, 535-536

Frans Maas (UK) Ltd v Samsung Electronics (2004) EWHC 1502 (Comm)

Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd (2000) 1 Lloyd's Rep. 199

Gainsco Insurance Co. v Amoco Production Co. 2002 WY 12253 P.3d 1051

Galoo Ltd (In liq) & Others v Bright Grahame Murray (a firm) and Another (1995) 1 All ER 16 (CA)

Gamerco SA v ICM/Fair Warning (Agency) Ltd (1995) 1 WLR 1226

General Cleaning Contractors Ltd v Christmas (1953) AC 180

George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd (1983) 2 AC 803

Gillespie Bros Ltd v Roy Bowles Transport Ltd (1973) QB 400

Glencore Energy UK Ltd v Cirrus Oil Services Ltd (2014) EWHC 87 (Comm)

Goldman v Hargrave (1967) 1 AC 645

Golstein v Bishop (2017) B.P.I.R 51; (2016) EWHC 2187

Goyings v Jack and Ruth Eckerd Foundation 403 So.2d 1144

Graham v Egan 15 La. Ann. 97, 98 (1860)

Granville Oil and Chemicals Ltd v Davies Turner and Co Ltd (2003) 1 All ER (Comm) 819

Gregory v Helvering 293 U.S. 465 (1935)

Grimshaw v Ford Motor Co. (Ford Pinto Case), 174 Cal. Rptr. 348 (Cal. Ct. App. 1981)

Guild & Co v Conrad (1894) 2 QB 885

Gwilliam v West Hertfordshire Hospitals NHS Trust (2003) Q.B. 443

Hadley v Baxendale Ex. 341, 156 Eng. Rep. 145 (1854)

Halborg v EMW Law LLP (2017) EWCA 793

Halliburton Energy Services Inc v Smith International (North Sea) Inc (2004) EWHC 2286 (Pat)

Hancock v BW Brazier (Anerley) Ltd (1966) 1 W.L.R. 1317

Harrison v Shepherd Homes Limited (2011) EWHC 1811 (TCC)

Hart v Traders & General Ins Co, 189 S.W.2d 493, 494 (Tex.1945)

Hawley v Luminar Leisure Plc (2006) EWCA Civ 18

Hayley v London Electricity Board (1965) AC 778

Hedley Byrne v Heller & Partners Ltd (1964) AC 465

Herrero v Atkinson, 227 Cal. App. 2d 69, 74 (Ct. App. 1964)

Hess Corp v Stena Drillmax III Ltd (2012) EWCA Civ 522; (2012) 2 All E.R. (Comm) 559

Hewlett Packard Ltd v Murphy (2002) IRLR 4

Higherdelta Ltd v Covea Insurance Plc (2017) CSOH 84; (2017) G.W.D. 21-349

HIH Casualty and General Insurance Ltd v Chase Manhattan Bank (2003) 2 Lloyd's Law Reports 61

Hirji Mulji v Cheong Yue Steamship (1926) AC 497

His Royal Highness Okpabi v Royal Dutch Shell Plc the Ogoni Community (2017) EWHC 89 (TCC)

Holland v Fidelity & Deposit Co of Maryland, 623 S.W.2d 469, 470 (Tex.App.-Corpus Christi 1981)

Home Office v Dorset Yacht Co (1970) AC 1004

Honeywill & Stein Ltd v Larkin Bros Ltd (1934) 1 KB 191

Hudson v Ridge Manufacturing Co Ltd (1957) 2 QB 348

Hut Group Ltd v Nobahar-Cookson (2016) EWCA Civ 128

IBM v Rockware Glass Ltd (1980) FSR 335

ICI Ltd v Shatwell (1965) AC 656

Ilford UDC v Beal (1925) 1 K.B. 671

Impact Funding Solutions Ltd v AIG Europe Insurance Ltd (formerly Chartis Insurance UK Ltd) (2017) A.C. 73

Indermaur v Dames (1866) LR 1 CP 274

Ingersoll-Rand Co v Valero Energy Corp 997 S.W.2d 203, 207 (Tex., 1999)

International Corona Resources Ltd v Lac Minerals (1989) 2 S.C.R. 574

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 898

Ireland v Livingstone (1872) LR 5 HL 395

Jackson v Mayfair Window Cleaning Co Ltd (1952) 1 All ER 215

James v Getty Oil Co (E. Operations), 472 A.2d 33 (Del. 1983)

Jet2.com v Blackpool Airport Ltd (2012) EWCA Civ 417

J. Lauritzen A.S. v Wijsmuller B.V. (The Super Servant Two) (1990) 1 Lloyd's Rep. 1

Jobson v Johnson (1989) 1 W.L.R. 1026, CA

Joe Adams & Son v McCann Constr Co., 475 S.W.2d 721, 723 (Tex. 1971)

John Lee & Son (Grantham) Ltd v Railway Executive (1949) 2 All ER 581

John Wyeth & Bros Ltd v Cigna Insurance Co of Europe SA NV (No. 1) (2001) EWCA Civ 175; (2001) Lloyd's Rep. I.R. 420

Johnstone v Bloomsbury HA [1992] QB 333

Jolliffe v Willmetts & Co (1971) 1 All ER 478 (QB)

Junior Books Ltd v Veitchi Co Ltd (1983) 1 AC 520

Krell v Henry (1903) 2 KB 740

Krysia Maritime Inc v Intership Ltd (The Krysia) (2008) EWHC 1523 (Admlty)

KS Energy Services Ltd v BR Energy (M) Sdn Bhd (2014) SGCA 16; (2014) B.L.R. 658

K/S Victoria Street v House of Fraser (Stores Management) Ltd (2011) EWCA Civ 904; (2012) Ch 497

Laceys Footwear (Wholesale) Ltd v Bowler International Ltd (1997) 2 Lloyd's Rep. 369

Lafrentz v M&L Leasing (2000) ABQB 714

LaFrenz, 172 Ind.App. 389, 360 N.E.2d 605

Latimer v AEC Ltd (1953) AC 634

Leakey v National Trust for Places of Historic Interest or Natural Beauty (1980) QB 485

Lease Management Services Ltd v Purnell Secretarial Services Ltd (1994) CCLR 127

Lebeaupin v Richard Crispin & Co (1920) 2 K.B. 714

Leinback v Pickwick Greyhound Lines, 138 Kan. 50, 65, 23 P. (2d) 449, 456 (1933)

Li v Yellow Cab Co, 532 P.2d 1226 (Cal. 1975)

Lister v Hesley Hall Ltd (2001) UKHL 22

Lloyd v Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944)

London Drugs Ltd v Kuehne & Nagle International Ltd (1992) 3 S.C.R. 299

Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd (54/08) (2013) ZAWCHC 64; 2013 (5) SA 42 (WCC); [2013] 4 All SA 71 (WCC) (29 April 2013)

Lukoil Mid-East Ltd v Barclays Bank plc (2016)] EWHC 166 (TCC)

Majrowski v Guy's and St. Thomas's NHS Trust (2006) UKHL 34

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd (1997) 2 W.L.R. 945

Maple Farms, Inc v City School District 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974)

Marbury v Madison 5 U.S. (1 Cranch) 137, 163-66 (1803)

Market Investigations Ltd v Minister of Social Security (1969) 2 QB 173

Matador Drilling Co v Post 662 F.2d 1190 (5th Cir. 1981)

Matania v National Provincial Bank Ltd (1936) 2 All E.R. 633

Matsoukis v Priestman & Co (1915) 1 K.B. 681 KBD

Mays v Pierce 203 S.W.3d 564 (Tex.App.-Hous. (14 Dist.) Sep 26, 2006) (NO. 14-05-00742-CV)

McDermid v Nash Dredging and Reclamation Co Ltd (1987) AC 906

Mersey Docks & Harbour Board v Coggins and Griffiths (Liverpool) Ltd (1947) AC 1 (HL) 10

Metropolitan Water Board v Dick Kerr & Co. (1918) AC 119

MGB Printing & Design Ltd v Kall Kwik UK Ltd (2010) EWHC 624 (QB)

MG Bldg. Materials, Ltd v Moses Lopez Custom Homes, Inc 179 S.W.3d 51, 64 (Tex.App.-San Antonio, 2005)

Michael v South Wales Police (2015) UKSC 2, at para. 167

Michael Duthie v Transocean North Sea Ltd and Others (2015) CSOH 20

Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (2013) EWCA Civ 200

Milligan v Wedge (1840) 12 A&E 737

Minera Aquiline Argentina v IMA Exploration (2006) BCSC 1102

Mineral Park Land Co v Howard 172 Cal. 289, 156 P. 458 (1916)

MIR Steel UK Ltd v Morris (2012) EWCA Civ 1397

Monarch Airlines Ltd v London Luton Airport Ltd (1998) 1 Lloyd's Rep. 403

Morris v Ford Motor Co (1973) QB 792

Morris v Redland Bricks Ltd (1970) AC 652

Moss Empires Ltd v Olympia (Liverpool) Ltd (1939) AC 544

MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt (2016) EWCA Civ 789

Murphy v Brentwood DC (1991) AC 398

National Semiconductors (UK) Ltd v UPS Ltd (1996) 2 LL Rep 212

Natol Petroleum Corp v Aetna Insurance Co 466 F.2d 38 (10th Cir. 1972)

Naylor (t/as Mainstreet) v Payling (2004) EWCA Civ 560

Nettleship v Weston (1971) 2 QB 691

New York Central Railroad Co v Lockwood, 1873, 84. U.S. (17 Wall.)357, 21 L.Ed. 627

Norscot Rig Management PVT Ltd v Essar Oilfields Services Ltd (2010) EWHC 195 (Comm)

North London Railway v Great Northern Ry

Overseas Buyers v Granadex (1980) 2 Lloyd's Rep 608.

Paciocco v Australia and New Zealand Banking Group Ltd (2016) HCA 28

Palfrey v Ark Offshore Ltd (2001) All ER (D) 304 (Feb)

Paniaguas v Aldon Companies, Inc, 2:04-CV-468-PRC, 2006 WL 2788585 (N.D. Ind. Sept. 26, 2006)

Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd, YFP Deepwater Co Ltd, EER (Colobus) Nigeria Ltd, Newage Exploration Nigeria Ltd, PR Oil & Gas Nigeria Ltd (2017) EWCA Civ 1525

Paradine v Jane (1647) EWHC KB J5; 82 Eng.Rep. 897 (1647)

Paris v Stepney Borough Council (1951) AC 367

ParkingEye Ltd v Beavis (2015) UKSC 67

Parkinson v Lyle Shipping Co. Ltd (1964) 2 Lloyd's Rep. 79

Patel v Mirza (2016) UKSC 42

Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] EWCA Civ 386

Pegler Limited v Wang (UK) Limited (2000) BLR 218

Penny v Wimbledon Urban DC (1899) 2 QB 72

Penta Corporation v Town of Newport v AECOM Technical Services, Inc No. 212-2015-CV-00011, 2016 N.H. Super LEXIS 7 (May 11, 2016)

Persimmon Homes Ltd v Ove Arup and Partners Ltd (2017) EWCA Civ 373

Petroleum Company of Trinidad and Tobago Limited v Ryan and Another (2017) UKPC 30

Petromec Inc v Petroleo Brasileiro SA Petrobras (2013) EWCA Civ 150

Phelps v Hillingdon LBC (2001) 2 AC 619 (HL)

Phillip Rosamond Drilling Co v St. Paul Fire and Marine Insurance Co 305 So. 2d 630 (La. Ct. App. 1974)

Photo Productions Ltd v Securicor Transport Ltd (1980) AC 827

Pine v DAS Legal Expenses Insurance Company Ltd (2011) EWHC 658 (QB)

Pitts v Jones (2007) EWCA Civ 1301

Point West London Ltd v Mivan Ltd (2012) EWHC 1223 (TCC)

Poland v John Parr & Sons (1927) 1 KB 236

P&O Property Holdings Ltd v Norwich Union Life Assurance Society (1994) 68 P&CR 261

Precision Drilling Canada Ltd Partnership v Yangarra Resources Ltd (2016) ABQB 365

Priestly v Fowler (1837) 150 ER 1030

Prudential Assurance Co Ltd v Ayres (2007) 3 All ER 946

Publicker Industries Inc v Union Carbide Corp 17 U.C.C. REP. SERV. 989 (E.D. Pa. 1975)

Rackham v Peek Foods Ltd (1990) BCLC 895

Radcliffe v Ribble Motor Services Ltd (1939) AC 215

Rainy Sky SA v Kookmin Bank (2011) UKSC 50

R. v McNair (Donald Niven) (1989) 11 Cr. App. R. (S.) 465; MarEx (2011)

Read v J Lyons & Co Ltd (1947) AC 156

Reedie v London and North West Rwy Co (1849) 4 Exch 244

Reliance Ins Co v Chevron USA, Inc 713 P.2d 766 (Wyo. 1986)

Re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico Case 2:10-md-02179-CJB-SS Document 5446

Reynard v Exquisite Quisine Ltd (t/a Latours Cuisine) 2006 S.C.L.R. 319 (OH)

Rhodia International Holdings v Huntsman International (2007) 2 All ER (Comm) 577

Riddle v Lanier, 136 Tex. 130, 145 S.W.2d 1094 (Tex. Comm'n App. 1941).

Rivers v Cutting (1982) 1 W.L.R. 1146

Robert Addie & Sons (Collieries) Ltd v Dumbreck (1929) AC 358 (HL)

Robinson v Harman (1848) 1 Exch. 850

Robinson v PE Jones (Contractors) Ltd (2012) QB 44

Rockwater Ltd v Technip France SA (formerly Coflexip SA) (2004) EWCA Civ 381

Rodrigue v Legros, 563 So. 2d 248, 255 (La. 1990)

Roles v Nathan (1963) 1 W.L.R. 1117

Rookes v Barnard (1964) AC 1129, (1964) 1 All ER 367

- Rose v Plenty* (1975) EWCA Civ 5, (1976) 1 All ER 97
- Rowe v Herman* (1997) 58 Con LR 33 (CA)
- Russell v Lemons*, 205 S.W.2d 629, 631 (Tex.Civ.App.---Amarillo 1947)
- Rylands v Fletcher* (1865) 3 H. & C. 774 (Court of Exchequer)
- Safeco Ins Co of Am. v Gaubert*, 829 S.W.2d 274, 281 (Tex.App.1992)
- Saint Gobain Building Distribution v Hillmead Joinery* [2015] EWHC B7 (TCC)
- Salomon v Salomon & Co Ltd* (1987) AC 22, HL
- Salvage Association v CAP Financial Services Ltd* (1995) FSR 654
- Scandinavian Trading Tanker Co. A.B. Respondent v Flota Petrolera Ecuatoriana Appellants* (1983) 2 A.C. 694
- Scottish Special Housing Association v Wimpey Construction (UK) Ltd* (1986) 31 BLR 17
- Seadrill Management Services Ltd v OAO Gazprom* (2011) 1 All E.R. (Comm) 1077
- SEB Trygg Holding Aktiebolag v Manches* (2005) 2 Lloyd's Rep. 129
- Sedleigh-Denfield v O'Callaghan* (1940) AC 880
- Shaun Campbell v Conoco (UK) Ltd, Amec Process and Energy Ltd, Salamis SGB Ltd* (2002) EWCA Civ 704
- Shell Oil Co v Khan* 138 S.W.3d 288, 298 (Tex., 2004)
- Short v J&W Henderson Ltd* (1946) 79 LI. L. Rep. 271
- Sino Channel Asia Ltd v Dana Shipping and Trading Pte Singapore, Dana Shipping and Trading SA* (2016) EWHC 1118 (Comm), at para 60
- Sir Lindsay Parkinson & Co Ltd v Works and Public Building Comrs* (1949) 2 KB 632
- Smit International (Deutschland) v GmbH Josef Mobius* (2001) CLC 1545
- Smith v Charles Baker & Sons* (1891) AC 325
- Smith v Eric S Bush* (1989) 1 AC 831
- Smith v Littlewoods Organisation Ltd* (1987) AC 241
- Smith v Penrod Drilling Corp*, 960 F.2d 456, 460, 1993 AMC 81, 185 (5th Cir. 1992)
- Smith v South Wales Switchgear Ltd* (1978) 1 All E.R. 18 (H.L.)

- Socimer International Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116
- South African Territories Ltd v Wallington* (1898) AC 309
- Southwark LBC v Tanner* (2001) 1 AC 1
- Spence & Howe Constr Co v Gulf Oil Corp* 365 S.W.2d 631, 634 (Tex. 1963)
- Spicer v Smee* (1946) 1 All E.R. 489
- Springwell v JP Morgan* [2010] EWCA Civ 1221
- St Albans City and District Council v International Computers Ltd* (1997) FSR 251
- Starlight Shipping Co v Allianz Marine & Aviation Versicherungs* (2015) 2 All E.R. (Comm) 747; (2015) Lloyd's Rep. I.R. 54
- Stevenson Jordon and Harrison Ltd v MacDonald and Evans* (1952) 1 TLR 101
- Stewart Gill v Horatio Myer & Co* (1992) QB 600
- Stewart Title Guarantee Company v Zeppieri*, (2009) O.J. No. 322 (S.C.J.)
- Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* (1967) 1 AC 361
- Syarikat Takaful Malaysia Bhd v Global Process Systems Inc* (2010) 3 All E.R. 248; (2010) 2 All E.R. (Comm) 224.
- Taylor v Caldwell* (1863) 3 B & S 826
- Tektrol Ltd (formerly Atto Power Controls Ltd) v International Insurance Co of Hanover Ltd* (2006) 1 All ER (Comm) 780
- Terrell v Mabie Todd & Co Ltd* (1952) 69 RPC 234
- Tessler & Son, Inc v Sonitrol Sec Systems*, 203 N.J.Super. 477, 497 A.2d 530 (1985)
- The Boy Andrew* (1948) A.C. 140
- Theriot v Bay Drilling Corp*, 783 F.2d 527, 539 (5th Cir. 1986)
- Thomas v Atl. Coast Line R.R. Co*, 201 F.2d 167 (5th Cir. 1953)
- Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* ((1968) 1 Lloyd's Rep. 16
- Thompson v London, Midland & Scottish Ry* (1930) 1 K.B. 41
- Tilley v Allied Materials Corp*, 208 Okla. 433, 256 P.2d 1110 (1953)
- TNT Global SPA v Denfleet International Ltd* (2007) EWCA Civ 405

Todorovic v Waller (1981) 37 ALR 481

Tomlinson v Congleton Borough Council (2003) 3 All ER 1122

Torain v Clear Channel Broadcasting, Inc 651 F.Supp.2d 125, 149 (S.D.N.Y., 2009)

Tor Corporate AS v Sinopec Group Star Petroleum Co Ltd (2011) CSH 54

Total Drilling Co v Abraham 64 N.M. 380, 328 P.2d 1083 (1958)

Tradigrain SA v Internek Testing Services (2007) EWCA Civ 154

Transatlantic Financing Corp v United States 363 F.2d 312 (D.C. Cir. 1966)

Transfield Shipping Inc v Mercator Shipping Inc (The Achilles) (2008) UK HL 48

Transocean Drilling UK Ltd v Providence Resources Plc (2016) EWCA Civ 372

Transocean Offshore Deepwater Drilling, Inc v Maersk Drilling USA, Inc, No. 11-1555 (Fed. Cir. Nov. 15, 2012)

Tubb v Bartlett, 862 S.W.2d 740, 750 (Tex.App.-El Paso 1993)

Tudor Grange Holdings v Citibank NA (1992) Ch. 53

Travista Development Pte Ltd v Augustine (2007) SGCA 57

Tweddle v Atkinson (1861) EWHC J57 (QB)

United Wire Ltd v Screen Repair Services (Scotland) Ltd (2000) 4 All E.R. 353

University of Keele v Price Waterhouse (2004) All ER (D) 264 (May)

Valeo v Pocono Int'l. Raceway, Inc, 500 A.2d 492 (1985)

Various Claimants v Institute of the Brothers of Christian Schools (2010) EWCA Civ 1106

Viasystems (Tyneside) v Thermal Transfer (Northern) (2006) QB 510

Vickers v Peaker 227 Ark. 587, 300 S.W.2d 29 (1957)

Vitol E & P Ltd v Africa Oil and Gas Corp (2016) EWHC 1677 (Comm).

Wallerstein v Spirit, 8 S.W.3d 774 (Tex. App.-Austin 1999, no pet.)

Walsh Constr. Co. v Mutual of Enumclaw, 104 P.3d 1146 (Or. Jan. 27, 2005)

Warren-Bradshaw Exploration Co v Tripplehorn 220 F.2d 291 (5th Cir. 1955)

Watford Electronics Ltd v Sanderson CFL Ltd (2001) EWCA Civ 317

Watkins v Rymill (1883) 10 Q.B.D. 178

Wellesley Partners LLP v Withers LLP (2015) EWCA Civ 1146

Westerngeco Ltd v ATP Oil & Gas (UK) Ltd (2006) EWHC 1164 (Comm)

Westminster CC v Duke of Westminster (1991) 4 All ER 136

Wheat v E Lacon & Co Ltd (1966) 1 All ER 582

White v Jones (1995) 2 A 207

Williams v Chrysler Corp, 148 W.Va. 655, 137 S.E.2d 225 (1964)

Williamson v Guitard (1993), 134 NBR (2d) 305

Wilson v Tyneside Window Cleaning Co (1958) 2 QB 110

Wilsons and Clyde Coal Ltd v English (1938) AC 57

Wood v Waterville, 4 Mass. 422, 423 (1808)

Yewbelle v London Green Developments (2007) EWCA Civ 475

Yuanda (UK) Co Ltd v WW Gear Construction Ltd (2010) EWHC 720 (TCC)

LIST OF LEGISLATION

Admiralty Extension Act (‘AEA’) 46 U.S.C. app. (1982 & Supp. III 1985)

Contract (Rights of Third Parties) Act 1999

CAL. CIV. CODE § 2778 (2009)

Clean Water Act (‘CWA’), 33 U.S.C.

Companies Act 2006

Death on the High Seas Act (‘DOHSA’) 46 U.S.C. app. (1982 & Supp. M 1985)

Insurance Companies (Legal Expenses Insurance) Regulations 1999

Law Reform (Contributory Negligence) Act 1945

Life Assurance Act 1774 (14 Geo. 3 c.48)

Longshoremen's and Harbor Workers’ Compensation Act (‘LHWCA’), 33 U.S.C. (1982 & Supp. III 1985)

Louisiana Act (LA. Rnv. STAT. ANN. § 9:2780 (West Supp. 1989)

Marine Insurance Act 1746

Marine Insurance Act 1778

Marine Assurance Act 1906

New Mexico Act (N.M. STAT. ANN. § 56-7-2 (1986)

Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976 (SI 1976/1019)

Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (OPGGSA)

Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2762 (2006)

Outer Continental Shelf Lands Act (‘OCSLA’), 43 U.S.C. (1982 & Supp. II 1985)

Sale of Goods Act 1979

Social Action Responsibility and Heroism (SARAH) Act 2015

Supply of Goods and Services Act 1982

Texas Anti-Indemnity Act (TEX. CIV. PRAC. & REM. CODE §§127.001 – 127.007)

30 TEX. JUR. 2d 444 Indemnity § I. (1964)

Unfair Contracts Terms Act 1977

Uniform Commercial Code (1978-2012)

Wyoming Act (Wyo. STAT. §§ 30-1-131 to -133 (1983)

DEDICATION

I am blessed to have the friendship, support and love of the most wonderful people anyone could wish for; people who have been there for me, urging me on, showing me that I can accomplish whatever I set my sights upon. They have never given up on me, believing in me even when I struggled with choices that only I could make.

For the privilege of a safe and secure upbringing, of guidance and guardianship, I remain eternally grateful to my dad, Professor Onyema Eugene Ofoegbu, and my mum, Dr (Mrs) Helen Ihunna Ofoegbu.

For enduring many days and nights of my absence, parenting our four lovely children all alone, holding the fort, soldiering on despite the odds, I am grateful for the gift of my wife, Nkechi Cybel Ofoegbu.

It is to these wonderful people that this thesis is dedicated.

ACKNOWLEDGMENTS

I give ALL the glory for this work to God Almighty whose grace and love kept me all through this journey. He gave me the good health, wisdom, understanding and knowledge to complete this study within the time allocated, and provided all that I needed to be comfortable and focused. I could never have done this without His enduring love and mercy, and He gets my eternal and unadulterated praise for this great feat and privilege.

My supervisors Dr Ken Mildwaters and Dr Xuanli Liao have been nothing but wonderful. Words are not enough to express my deepest and heartfelt gratitude to both of them for making this possible. At the onset of this journey, I prayed to God for a miracle, and He sent Dr Ken. Not for once was he late in providing feedback. Not once. I am grateful for the length of time he dedicated to me, in ensuring that I was on the right path, in providing quality guidance, in being a solid source of encouragement. Dr Janet's candour and forthrightness, friendship and support were unparalleled. Her words of encouragement, and the steps she took in furtherance of my success are very much appreciated. Her office provided a calm and calming environment within which I knew I could thrive and make a success of this quest. Not once did I feel sad or anxious at attending any meeting with my supervisors because they made me feel so welcome, so relaxed.

I am indebted to Gretchen Mildwaters, Dr Ken Mildwaters' wife, for the many days she welcomed me into their home office, and the many meals she cooked for me in the course of this programme. She has been a source of strength and support for which I am grateful.

I am also grateful to the Examination Committee made up Dr Greg Gordon, Dr Sergei Vinogradov and Stephen Dow for their useful insights and for doing a sterling job at helping me claim credit for a wider territory reflective of the work done in my thesis.

My wife Nkechi, and our lovely children Chidubem, Chibudom, Chidiebube and Chimamanda who had to endure my long absences from home have my unending vote of thanks. They collectively provided the solid support base that made it possible for me to focus on the work and finish in good time. My parents Professor Onyema and Dr Helen Ofoegbu, as well as my lovely siblings Dr Chima Kingsley and Dr Buky Ofoegbu, Uche and Ogechi Okoli, Gozie and Sylvia Ofoegbu, Dr Amaka Vera Ofoegbu have been more than wonderful. Their love, prayers and companionship through it all helped in making this journey a huge success for which I am truly indebted and grateful to them.

My friends Ubong King (the Troublemaker), Paschal Onugha, Godwin Etim, Aniekan Bassey, Asuquo Okpo have been consistent in their support and encouragement, and their labour of love is gratefully acknowledged.

I am also grateful to all the members of staff in the Library of the University of Dundee, particularly Iain Gillespie, Scott McGregor, Arlene McIntosh and Beverly Wake. Never have I seen a more dedicated collection of staff who are genuinely interested in helping students succeed. I am truly grateful for their friendship, support, patience and encouragement which form part of my unforgettable and memorable sojourn in the University of Dundee.

DECLARATION

I, Kelechi Onyekachi Ofoegbu, hereby make the following declaration:

- (a) that I am the author of this thesis;
- (b) that I consulted all references cited;
- (c) that the work of which the thesis is a record has been done by myself; and
- (d) that this thesis has not been previously accepted for a higher degree.

Kelechi Onyekachi Ofoegbu

Date

ABSTRACT

This study is an examination of how English courts have approached, or are likely to approach – and therefore, the effectiveness of – attempts by the parties to oil and gas contracts to allocate risks arising from the activities which form the subject matter of their respective contracts *inter se*. The study utilises petroleum industry standard form offshore drilling contracts in the United Kingdom, Canada and the United States of America as the context for this analysis, and examines the risks associated with drilling and other incidental operations, in the light of catastrophic events such as the Macondo disaster in the Gulf of Mexico and the Montara disaster in the Timor Sea. y

Drawing from the *Economic Theory of Law* espoused by Richard Posner, which correlates market behaviour, resource allocation and the legal system, and so conceptualises risk from a cost and utility perspective, the study will show that it is actually the *economic* consequences of the occurrence of an event that are being allocated, and that the entire notion of *risk allocation* is a determination of how the economic cost of the occurrence of the particular consequence will be borne by the parties to the contract.

The study will conclude with a comparative analysis of risk allocation in the different model contracts, and an opinion on the success/effectiveness of the model contracts, as tools used by parties for risk allocation *inter se*, in response to the challenges created by legislative and judicial intervention. Justification for this opinion will be given, with reference to relevant case law and statutes in the different jurisdictions.

Recommendations will be made on how the risk allocation structure can be improved, either by reference to other approaches the parties could adopt, or by clarifying ambiguities in the current

approach (where applicable), and proposing a balance in the instances in which, from the study's perspective, the allocation formula is skewed, either due to the imbalance of power between the parties or by the interference of external forces such as the courts and legislature.

INTRODUCTION

That extractive activities in upstream oil and gas are fraught with a lot of risks is no longer news; this awareness has existed from the very beginnings of endeavours in this regard. Progressively, the industry has continued to improve on the methods of conquering Mother Nature, going where the geology leads, and developing technology to meet the challenges encountered on this voyage. But the expected push-back from Mother Nature is not all that practitioners have to contend with; other risks are recognised, and attempts have been made to manage them as well.

There is no denying the fact that the risks faced by parties to oil and gas contracts have increased in tandem with the complexities of doing business in general, as there are now more regulatory, compliance, operational and social requirements to fulfil. This is especially true for drilling contracts. Indeed, the nature of contracting at the inception of the petroleum industry, which gives an insight into the state of the industry as a whole, was so rudimentary, that Moomjian¹ indicated that a ‘state of naiveté’ prevailed, to such an extent that there were several instances *where the drilling is under way, and sometimes completed before the contract is signed*² (emphasis added).

With increased complexities and risks in drilling contracts, parties have had to focus on mechanisms for allocating risks in a manner that achieves their individual contract objectives, while ensuring that specific risks are assumed by the parties best suited to manage them, all relevant factors considered.

As straightforward as the above sounds, contractual risk allocation is no mean task. The negotiation process through which risk allocation is achieved can sometimes be long drawn out,

¹ Moomjian, C. A. “*Drilling Contract Historical Development and Future Trends Post-Macondo: Reflections on a 35-year Industry History*”, Paper presented at the IADC/SPE Drilling Conference in San Diego, on March 7, 2012, at p.2. He was citing another publication: ‘Insurance – A Necessity for Drilling Contractors’, The Drilling Contractor Magazine, May 1945 Edition.

² *Ibid*, at p.2.

rancorous and one-sided, with an outcome that leaves at least one party feeling that it has just been left with the rough end of the stick. This is dependent on factors such as the balance of power between the parties, prevailing market/economic conditions, and affiliation of parties to drilling associations.

The scenario is further complicated by the influence of external factors outside the parties' control, such as the applicable law in the jurisdiction of choice of the parties, or the jurisdiction to which the contract is subject, as a matter of law. Add to this the role of the courts, which is evident in pronouncements made on the subject matter, which have sometimes resulted in situations in which parties have been left picking up pieces of their contracts, bearing the full brunt of risks previously thought to be properly allocated to the other party.

At the heart of every contract is the expectation that its contents will be enforced in line with the 'intention' of the parties. The principle of freedom of contract is recognised in common law, and as Atiyah³ argues, this arose from equating free market economy with contract law principles, which then provided the platform upon which individuals could trade among themselves based on their preferred terms and conditions.⁴ However, this freedom has been curtailed by judicial intervention and relevant principles of law, which for instance, subject contract terms and conditions to the *reasonable man's* test of interpretation,⁵ as well as to the principles of substantive justice.⁶

As internal and external factors continually interfere with the way in which parties have allocated risk in the contract, parties have responded by resorting to petroleum industry model contracts

³ Atiyah, P. S. (1979) *The Rise and Fall of Freedom of Contract*. Oxford University Press.

⁴ *Ibid.*, at p. 402.

⁵ Per Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 898. See also *Arnold v Britton* (2015) UKSC 36; (2015) AC 1619, at 5- 6 (with Lord Carnwath dissenting); and Lord Hoffmann in *Attorney General of Belize v Belize Telecom* (2009) UKPC 10.

⁶ Also observed by Atiyah (1979), *Op.Cit.* at p. 402.

for the drilling of offshore wells to allocate the risks associated with drilling and incidental operations, in the light of catastrophic events such as the Macondo disaster in the Gulf of Mexico and the Montara disaster in the Timor Sea. Parties have sought to utilise the model contracts to overcome legislative and judicial hurdles, while preserving their – the parties – core intent and contract objectives.

Given the global nature of the oil and gas business, it is inevitable that different model contracts are utilised, depending on the prevailing law in the jurisdiction in which the work is sought to be performed, the balance of power between the parties, prevailing market/economic conditions, and the affiliation of parties to drilling associations.

Model contracts have been proposed by regional drilling associations to guide contract negotiations between parties. These model contracts are, at best, guidelines that can be adopted and/or adapted by the parties in line with the realities of their contracting circumstances.

Thus, in the United Kingdom, Oil & Gas UK,⁷ the representative body of the UK offshore oil and gas industry, has, through LOGIC,⁸ its not-for-profit wholly owned subsidiary, developed model contracts,⁹ including the Mobile Drilling Rigs Contract, Edition 1, primarily intended to guide parties in their negotiations with respect to offshore drilling operations proposed to be carried on within the United Kingdom Continental Shelf. The document can also be utilised outside the United Kingdom, subject to such amendments as may be necessary to give effect to the contract in a manner that complies with the laws of the governing jurisdiction of the contract.

⁷ <http://oilandgasuk.co.uk/about-us.cfm>

⁸ Leading Oil and Gas Industry Competitiveness (UK), operates as the custodian for cross-industry projects that aim to increase the efficiency of working practice in the United Kingdom Continental Shelf (known as the UKCS): <http://www.logic-oil.com/>

⁹ <https://www.logic-oil.com/content/standard-contracts-0> Standardisation of contracts is an objective initially introduced in the 1990s by the CRINE (Cost Reduction in New Era) initiative, with the aim of reducing costs by 30% and helping to simplify the industry's procedures.

In United States of America, the International Association of Drilling Contractors (IADC) has developed model contracts for onshore and offshore drilling campaigns, and further distinguishes between model contracts for domestic use within the United States of America and international use.¹⁰ Different model contracts have also been developed for offshore drilling, depending on whether the activity is to be undertaken as a daywork contract,¹¹ a footage contract¹² or a turnkey contract.¹³

In Canada, the Canadian Association of Oilwell Drilling Contractors (CAODC) and the Canadian Association of Petroleum Producers (CAPP) have developed model contracts that are mostly utilised within Canada. The CAODC/CAPP Master Daywork Contract,¹⁴ for instance, which applies to offshore drilling, was negotiated and agreed between both associations, and came into existence in May 2001. This was further updated in 2004, and is generally utilised as the baseline for offshore drilling operations in Canada.

In addition to these, some operators and drilling contractors have also designed their own model contracts, and the ability of parties to amend them during negotiation (and the extent thereof) is also dependent on the balance of power between them, as the well as the prevailing market/economic conditions at the time at which the work is sought to be executed.

¹⁰

<https://iadc.ebiz.uapps.net/personifyebusiness/OnlineStore/ProductListing/tabid/56/Category/CONTRACTS/Default.aspx>

¹¹ A 'day-rate' or 'daywork' contract provides that the drilling contractor be paid a stipulated price (rate) for work performed at the direction of the operator over a 24-hour period, with the contractor assuming only specified risks: Calkins, 'The Drilling Contract – Legal and Practical Considerations', 21 Rocky Mt. Min. L. Inst. 285, 288 (1975), cited by Anderson, O. L. (1989) 'The Anatomy of an Oil and Gas Drilling Contract', *Tulsa LJ*, 25, pp. 359-533, at p.16.

¹² A 'footage' contract provides that the drilling contractor be paid a stipulated price per foot of hole drilled from the surface through the total: *ibid.* at p.18.

¹³ A 'turnkey' contract provides for the drilling contractor to be paid a stipulated price for drilling a well to a specified depth or a targeted formation; *Ibid.* at p.20.

¹⁴ <http://www.capp.ca/publications-and-statistics/publications/72825>.

PROBLEM STATEMENT

Risk factors are potential areas of conflict in a contract, and the complexities inherent therein can escalate, especially when adversity strikes. As the boundaries of global business disintegrate, and commerce is carried on between parties in different parts of the world, the complexities in risk, and the allocation of risk, become even more apparent and present. Add to this the fact that the parties may be utilising model contracts with which they are not familiar, ostensibly designed for a different jurisdiction, and which may admittedly be subject to different regulatory regimes/jurisdictions, and by extension, different legal interpretations.

A review of the case law and literature on this subject shows that different model contracts contain provisions that embody differing approaches to risk allocation. Risk managers are inevitably forced to assess risks under many different drilling contract forms,¹⁵ and can sometimes misunderstand the scope and reach of the relevant risks, as well as the party to whom particular risks have been allocated. Determining the party who is better able to bear and manage allocated risks, and issues of risk sharing, as well as the judicial treatment and approach of courts to risk allocation, have proved to be problematic, especially regarding the enforcement of indemnities, insurance, exclusions and limitation of liability.

This study will examine whether the attempt by the parties to allocate risks between themselves, through the instrumentality of model contracts, in response to the challenges created by legislative and judicial intervention, has been successful and/or effective. This examination is from an English law perspective, and would inevitably be made by reference to the very same institutions – legislature and judiciary – in the English courts, and their response and attitude to the model contracts.

¹⁵ Foster, S. J., Gibbie, K. W., Mason, D. C. and Baron, S. L. 'Risks Assumed In Drilling Contracts: Global Comparison and Case Histories'. *SPE/IADC Drilling Conference*: Society of Petroleum Engineers, at p.1.

RESEARCH OBJECTIVES

The central objective of this study is to examine whether the attempt by the parties to oil and gas contracts, and in particular, offshore drilling model contracts in the United Kingdom, Canada and the United States of America to allocate risks between themselves, has been successful and/or effective in the light of the challenges created by legislative and judicial intervention. In this regard, this study will:

1. Investigate the correlation, similarities and differences that exist among the model contracts, with a view to understanding how risks are allocated therein.
2. Discuss perspectives of risk allocation from the standpoints of the parties.
3. Examine the different contractual tools that are utilised in the different model contracts to allocate risk, such as indemnities, insurance, exclusions, and limitation of liability.
4. Develop a matrix of the risks to be allocated.
5. Examine potential areas of confusion in the allocation of such risks, and propose measures that infuse clarity.
6. Examine potential problems arising from the way in which such risks have been allocated, discuss how the courts and legislature might address these problems, and identify possible solutions thereto.

RESEARCH QUESTIONS

This study will primarily address the following question:

How effectively have parties to oil and gas contracts, and in particular, offshore drilling model contracts in the United Kingdom, Canada and the United States of America allocated risks inter se, considering legislative and judicial approaches thereto?

In the context of this study, ‘effectiveness’ would be assessed by the success of the parties in allocating risk *inter se*, in a manner that stands up to judicial and legislative scrutiny, from an English law perspective, while taking into consideration the party best able to bear a given risk.

Flowing from this, the following sub-questions will also be addressed:

1. What similarities and differences exist in the perspectives of risk allocation between the operator and contractor under the different offshore drilling model contracts?
2. What risks are inherent in the selected regional offshore drilling model contracts, and how are these risks allocated between the operator and the contractor?
3. How might the English courts and legislature respond to the attempt by parties to the offshore drilling model contracts to allocate risks among themselves?
4. How can risk allocation be harmonised under the different model contracts, especially regarding the treatment of indemnities, insurance, exclusions, and limitation of liability?

RESEARCH METHODOLOGY

This study is an analysis of the contractual allocation of risk under petroleum industry offshore drilling model contracts, and is essentially an examination of how English courts and legislature have approached, or are likely to approach (and therefore, the success and/or effectiveness of) attempts by the parties to petroleum industry model form contracts for the drilling of offshore wells, to allocate the risks associated with drilling and other incidental operations, in the light of

catastrophic events such as the Macondo disaster in the Gulf of Mexico and the Montara disaster in the Timor Sea.

This study is a doctrinal research (with certain non-doctrinal elements) that utilises the comparative case study methodology. Kaarbo and Beasley¹⁶ define comparative analysis as ‘the systematic comparison of two or more data points (‘cases’) obtained through use of the case study method’.¹⁷ They also confirm that case studies can be both qualitative as well as narrative, and do not necessarily need to rely on multiple sources of evidence in order to function.¹⁸

Pickvance,¹⁹ validating the usefulness of comparative analysis as a research method, opines that its purpose is to obtain an informed understanding of events and their cause.²⁰ He identifies two conventional types of comparative analysis (the first explains the rationale for similarities and differences between phenomena, and the other emphasises data collection), and proposes two additional types that reveal a pluralist approach and focus on emergent phenomena in different societies.²¹ This built on an earlier version of his work²² in which he argued that the focus on underlying causes expands the scope and use of comparative analysis as a research methodology.

The choice of methodology is justified by the aim of this thesis, which is to undertake an analysis of the contractual allocation of risk under petroleum industry offshore drilling model contracts in the United Kingdom, United States of America and Canada. From the available literature,

¹⁶ Kaarbo, J. and Beasley, R. K. (1999) ‘A Practical Guide to the Comparative Case Study Method in Political Psychology’, *Political Psychology*, 20(2), at pp. 369–391; also available online at <http://onlinelibrary.wiley.com/doi/10.1111/0162-895X.00149/abstract>

¹⁷ *Ibid*, at p. 372

¹⁸ *Ibid*, at p. 373

¹⁹ Pickvance, C. ‘The Four Varieties of Comparative Analysis: The Case of Environmental Regulation’, Conference on Small and Large-N Comparative Solutions, University of Sussex, U.K., 22–23 September 2005 University of Sussex, U.K.

²⁰ *Ibid*, at p. 2.

²¹ *Ibid*, at p. 6.

²² Pickvance, C. G. (2001) ‘Four Varieties of Comparative Analysis’, *Journal of Housing and the Built Environment*, 16(1), at pp. 7–28.

this type of study is best undertaken utilising the chosen methodology, based on the objective of exploring similar and dissimilar phenomena in the different model contracts by using similar parameters.

The research approach will be qualitative, with theoretical and descriptive components that highlight perspectives of operators and contractors to the contractual allocation of risk under petroleum industry offshore drilling model contracts, while examining specific subjects that aid in answering the research questions.

To undertake this research, a comparison framework has been developed, which is made up of:

- The outline of the model contracts, particularly with respect to certain provisions²³ that were selected based on their criticality in examining risk allocation regimes;
- Judgements of the courts in the countries in which the model contracts that are the subject of this research have been developed;
- Selected legislation in the countries in which the model contracts that are the subject of this research have been developed, and that address allocation of risk in commercial contracts, and especially those that impact offshore drilling contracts;
- Doctrines of law (such as conscionability, freedom of contract and public policy) which guide the courts in reaching decisions; and

²³ Loss of Life and Injury to Personnel; Loss of/Damage to Surface and Sub-Surface Equipment; Consequential Losses; Depreciation of In-Hole Equipment; Pollution (Arising Below and Above Surface of Ground); Liability for Third Parties; Formation Damage; Loss of Hole and Wild Well Liability; Patent Infringement; Debris Removal; and Deliberate Well Firing.

- Principles of industry practice (for instance, the doctrine of *Tradition*²⁴), which, though not law, have been ‘accepted’ by the oil and gas industry and evidenced by long and sustained practice, as being applicable to offshore drilling contracts.

The research draws on three discrete economic theories:

- (a) The theory of *risk* and *reward*²⁵ which posits that parties, as rational people, will accept higher risk as long as this translates into higher profits that surpass the cost of capital attendant upon the increased risk.
- (b) The neoclassical²⁶ theory of *incentives*²⁷ that parties, as rational people, will act in a manner that maximises utility, and will keep doing this so long as there is an incentive to do so.
- (c) The *transactional efficiency*²⁸ theory, which measures risks in terms of transactional costs, as well as the utility or disutility resulting from a given event. The objective here is to achieve transactional efficiency, and a crucial way of doing this is to determine which party is best situated to bear a given risk.

²⁴ Cited in Rankin, M. D. and Richardson, D. R. ‘The Offshore Drilling Contract-Operator and Contractor Perspectives’, *IADC/SPE 1983 Drilling Conference*, New Orleans, Louisiana, February 20–23, 1983. Texas, USA: Society of Petroleum Engineers, 1–8. The doctrine of *tradition* operates on the premise that risk for designated personnel, equipment and procedure is usually assigned to the contractor, leaving the other obligations/risks to be allocated between the parties, in the absence of which any unallocated risk will default to the operator.

²⁵ See, for example, Burke, M., Nicholas P., (2010) *Risk versus Reward Capital Markets: Indonesia Dispute Resolution*. 29 Int'l Fin. L. Rev. 25 2010–2011, p. 25; Millage, A. (2007) ‘Risk and Reward’, *The Internal Auditor*, 64(5), p. 6; Albion, M. S. (2008) *More Than Money: Questions Every MBA Needs to Answer: Redefining Risk and Reward for a Life of Purpose*. San Francisco: Berrett-Koehler Publishers; Quartz, S. R. (2009) ‘Reason, Emotion and Decision-Making: Risk and Reward Computation with Feeling’, *Trends in Cognitive Sciences*, 13(5), at pp. 209–215.

²⁶ Neoclassical theory is based on three fundamental assumptions: (i) people have rational preferences among outcomes; (ii) individuals maximise utility and firms maximize profits; and (iii) people act independently on the basis of full and relevant information. See, for example, Weintraub, E. R. (1993). ‘Neoclassical Economics’ in Henderson, D.R. (ed.) *The Concise Encyclopedia of Economics*. Library of Economics and Liberty: <http://www.econlib.org/library/Enc1/NeoclassicalEconomics.html>; accessed 14 June 2016.

²⁷ See, for example, Althaus, C. E. (2005) ‘A Disciplinary Perspective on the Epistemological Status of Risk’, *Risk Analysis*, 25(3), pp. 567–588, at p. 573.

²⁸ See, for example, Diamond, P. A. (1974) ‘Posner's Economic Analysis of Law’, *The Bell Journal of Economics and Management Science*, 5(1), pp. 294–300, at p. 298.

Drawing from these theories, which correlate market behaviour, risk shifting, resource allocation and the legal system, and so conceptualise risk from cost and utility perspectives, the study will show that it is actually the *economic* consequences of the occurrence of an event that are being allocated, and that the entire notion of *risk allocation* is a determination of how the economic cost of the occurrence of the particular consequence will be borne by the parties to the contract. The focus on *economic* consequences recognises that other consequences may be triggered by the occurrence of an event – *legal, factual, reputational* – which could have different implications and effect in contrast from the *economic* consequences of the occurrence of a given event.

Secondary data will be utilised for this research, and will be sourced from case law, academic journals, previous research, legal textbooks, contract documents, legal opinions and legislation.

The research methodology will answer the research questions relating to effectiveness of the risk allocation between the parties, as the comparison framework draws on the relevant parameters that address judicial and legislative responses to the allocation, while the theories will address the question as to whether risk has been allocated to the party that is best able to bear a given risk.

SCOPE OF THE STUDY

This study will focus on the different types of drilling contracts²⁹ already identified.³⁰ Given the fact that these types of contracts can be utilised, either offshore, on land or in seasonally swampy terrain, this study will concentrate on offshore drilling contracts.

²⁹ Daywork, Turnkey and Footage contracts, *supra*.

³⁰ In the section: Introduction.

Furthermore, the geographical regions to be examined are the United Kingdom, Canada and the United States of America. These regions have been chosen because the model forms that have been developed by the regional associations³¹ are most commonly utilised in practice globally. Thus, these forms, inclusive of a model developed by a major international oil company, are reflective of the global spread of the types of contracts utilised for offshore drilling.

Although experiences and parallels may be drawn from other regions in the course of this study, the focus will remain on the primary areas of the comparative analysis.

ORIGINALITY AND SIGNIFICANCE OF THE STUDY

There is no literature that compares offshore drilling model contracts developed by drilling associations in the United Kingdom, Canada and the United States of America, and from the perspectives, or based on the theories that are the subject of the current research. Furthermore, this research contains detailed analysis of the subject-matter, especially on the relevant sub-elements (such as the compendium of risks in the drilling contracts).

In particular, this study will contribute to the current state of knowledge in the following ways:

1. Enriching the understanding of risk allocation in the offshore drilling model contracts from the perspectives of parties.
2. Providing detailed insight into similarities and differences in the model contracts, in the geographical regions under consideration.
3. Enhancing the model contract selection process by parties, through the detailed analysis of the pros and cons of each model contract vis-à-vis the objectives sought to be achieved vide the contract.

³¹ Mobile Drilling Rigs Contract, Edition 1, developed by Oil & Gas UK, through LOGIC; daywork, footage and turnkey contract models developed by the International Association of Drilling Contractors (IADC) in the USA; and the CAODC/CAPP Master Daywork Contract developed by the Canadian Association of Oilwell Drilling Contractors (CAODC) and the Canadian Association of Petroleum Producers (CAPP).

4. Generating improved discourse between parties on the different regimes of indemnities, insurance, exclusions, and limitation of liability in the different model contracts, helping them refine and define their common intention, aligning this with extant legal jurisprudence on the subject area.
5. Proposing possible judicial and legislative approaches to problems arising from the way in which risk has been allocated by parties to the model offshore drilling contracts, and possible solutions thereto.

STRUCTURE OF THE THESIS

Although this study is meant to provide a theoretical framework for contractual risk allocation in offshore drilling contracts, it recognises that actual drilling activities will take place pursuant to the clauses under consideration. Thus, the study will be approached with a practical flavour, which makes it relevant to industry as well as researchers who are interested in this field of study.

In this regard, this study is divided into seven chapters. Chapter 1 sets the stage for the study by examining the theoretical and jurisprudential understanding of risk as a concept. Like other similar concepts, risk does not admit of a single or commonly accepted definition, but can be approached from different perspectives, depending on whose world view is being considered. However, before starting the definitive journey, it is worthwhile to distinguish ‘risk’ from other related concepts that could, in certain instances, be construed as being the same thing, and have been used interchangeably in different contexts.

Thus, ‘risk’ is contrasted with concepts such as ‘uncertainty’, ‘hazard’ and ‘probability’. An early understanding of what is considered as ‘risk’ properly so called, is germane to the overall appreciation of the study. This study then examines risk in different contexts – legislative,

judicial, epistemological, economic – highlighting the preferred approach, which also serves as the basis of consideration of the subject. An overview of risks in general is also presented. While acknowledging that risks can be categorised in different ways, the ‘PESTLEO’³² approach is preferred as it enables detailed focus to be given to each head of risk, together with how they interface, one with the other.

Thereafter, the study examines different strategies for managing risks in general, not from any particular perspective. Examples are drawn from different sources, the aim being to establish risk allocation as one, and not the only, strategy for managing risk, between parties to a contract. The study shows that risk allocation usually occurs in conjunction with other strategies and, though largely a formal process, can also occur by default.

This part of the study is wrapped up by considering insurance as a risk management strategy, and considers the different aspects of insurance that impact on contractual risk allocation, even though it occurs outside, but may be required by, the subject drilling contract, focusing on the ‘additional insured’ status and benefits of being conferred with this status, as well as the crucial role it plays in ensuring the efficacy of indemnification provisions in the contract.

Having established what risk is in general and, by extension, what it is not, Chapter 2 introduces the drilling process and drilling contract, situating these within the petroleum oilfield lifecycle, and highlighting the specific risks that arise from the drilling process. This chapter lays the foundation for further discourse on the risks that contract parties allocate *inter se* in the drilling contract, and focuses on the offshore drilling contract after the discussions on risk allocation in contracts in general. The point must be made that the offshore drilling contract is, first and foremost, a contract, and so subject to the normal rules, interpretations and limitations to which

³² Acronym that stands for ‘political, economic, social, technology, legal, environmental and operational’.

contracts ordinarily defer. This chapter also deals with the dynamics of the relationships between the operator, non-operator and contractor. Although the non-operator may not be a party to the drilling contract, their role and status as co-venturers with the operator in the Joint Operating Agreement (JOA) means that they have an interest in the drilling contract. The nature of this interest, as well as the implications for their relationship with the contractor will be discussed in detail.

Chapter 3 analyses the legal framework for risk allocation, starting with the bedrock positions that existed prior to the current contractual and legislative intervention. Essentially, it will examine how the courts allocated risk between contract parties in the absence of contractual and/or legislative provisions.

Chapter 4 focuses on the contractual response to the way in which the courts allocated risk, highlighting the different mechanisms for the actual allocation of risks between parties. This chapter builds on the preceding chapters that set the conceptual foundation for understanding risk and the legal framework for allocating it. This section commences by taking a detailed look at the various ways by which the parties negotiate their contractual risk portfolio. In this vein, detailed examination of indemnities, insurance, exclusions and limitation of liability, which define the risk structure in the contract, is undertaken. Reference is made to case law and the different perspectives and arguments that parties make to buttress their preferred outcomes when the mechanisms are utilised.

Chapter 5 deals with legislative intervention in the way in which the parties allocate risk contractually. The underlying bases for the intervention are discussed, together with the impact that each intervention sought to make. This chapter undertakes an analysis of the interventions made by the legislature in the risk allocation process, taking into consideration the higher calling of balancing interests, not only as between the contract parties, but those of other stakeholders,

including the State and third parties, who may be impacted by the contract. The role of the legislature in walking a fine line between preserving the ‘intention’ of the parties, as expressed in their contract, and ensuring that the outcomes cohere with extant law and practice will be examined in detail.

Having established the different risk perspectives of the parties, Chapter 6 dissects the different model contracts, and then proceeds to consider the risk allocation formula adopted in each of them *in seriatim*. As part of this section, the model contract from a major international oil company, which has been utilised in practice, is also considered and analysed with reference to the risk allocation structure for the identified risks. The study will propose a matrix of the risks and how they are allocated in the different model contracts, highlighting areas in which confusion exists, and proffers positions and outcomes that will aid the state of knowledge in this regard.

Chapter 7 undertakes a comparative analysis of model offshore drilling contracts. In this chapter, the study compares the model contracts with reference to the risk allocation methods, noting similarities and differences, and referring to case law where relevant. A discussion on how the English courts have responded to the risk allocation structures in the different model contracts is a highlight of this section, also leveraging the discussions in the previous chapters, where necessary. This chapter culminates with the outcome of the comparative analysis, and an opinion on the success or effectiveness of the model contracts, as tools used by contract parties for risk allocation, in response to the challenges created by legislative and judicial intervention. Justification for this opinion is given, with reference to relevant case law and statutes in the different jurisdictions that will be discussed during the study.

The CONCLUSION summarises the discussions in the study, and highlights the contributions that this study makes to the existing body of knowledge on the subject matter that it covers. It also suggests the area in which future research is possible.

Chapter 1

UNDERSTANDING THE CONCEPTS OF RISK AND RISK MANAGEMENT

Introduction

In this chapter, the study focuses on the theoretical approaches to risk and risk management. This focus is based on the premise that a sound understanding of the underlying concept of risk is necessary in instituting a theoretical baseline in the approach adopted in this study. This step is made more crucial by the fact that there are different disciplinary approaches to the concept of risk, given its pervasive nature and occurrence in various aspects of human affairs.

The literature reveals that even within the same schools of thought, different writers have categorised risk in diverse ways, although it is sometimes possible to deduce the common theme that connects them theoretically.

The approach of the courts and legislature to risk is also examined. Their respective roles as adjudicators and legislators make it imperative to understand their perspectives, as the whole essence of the contractual arrangements between the parties to offshore drilling contracts, is that efficacy will be given to the commitments that they have ‘freely’ undertaken. A divergence in approach and/or understanding between the parties to the offshore drilling contract and the court and/or legislature could result in interventions, interpretations and/or decisions that are unintended and unwanted.

Risk has been distinguished from other concepts such as ‘uncertainty’, ‘hazard’, and ‘probability’,³³ the common thread running through the distinctions being the somewhat

³³ Knight, Frank H. (1921), ‘Risk, Uncertainty, and Profit’. Boston, MA: Hart, Schaffner & Marx; Houghton Mifflin Co. Library of Economics and Liberty [Online] available from <http://www.econlib.org/library/Knight/knRUP1.html>; accessed 24 February 2016.

measurable or calculable nature of risk, which is conflated with the ability to manage this by accepting, transferring, allocating and/or mitigating it. These concepts are examined in this section to enhance the understanding of ‘risk’, avoiding the ideological divides that still exist as far as definitional approaches to the different concepts are concerned.

Risk allocation is a method of risk management, and to situate this strategy properly within the risk management portfolio, an examination of other strategies is undertaken. The aim is to show that risk allocation is one – and not the only – risk management strategy that parties could adopt to give effect to their contract, and that ‘allocation’ could sometimes be a shorthand way of describing the rest of the risk management strategies that are actually being executed by the parties, deliberately or otherwise.

Given the focus of this study on contractual risk allocation, this section shows that, notwithstanding the theoretical approaches by the different writers, risk is context-dependent, and can only be truly understood, and given application, within specific event-driven contexts. The study posits that this context is an economic outcome, as the real essence of risk allocation is contractually to determine who will bear the economic consequences of the occurrence of the specific event.

Furthermore, this chapter of the study demonstrates that the term ‘*risk allocation*’ is a misnomer, when considered from a contractual risk allocation perspective, as, from the literature it assumes that a risk *event* is being allocated,³⁴ when, in actual fact, it is the *economic consequences of the occurrence of an event* that are being allocated. Given the fact that several consequences could emanate from a certain event, this section shows that it is actually the *economic* consequences

³⁴ See, for instance, the discussion by Moomjian, C. A. (2012), *Op Cit*, at p. 10, on the impact of Macondo on allocation of liability for pollution arising from the well.

of the occurrence of an event that are being allocated, and that the entire notion of *risk allocation* is a determination of how the economic cost of the occurrence of the particular consequence will be borne by the parties to the contract.

1.1 ‘Risk’ Contrasted with ‘Uncertainty’, ‘Hazard’ and ‘Probability’

1.1.1 *Risk and Uncertainty*

In spite of the definitional diversity of ‘risk’, there seems to be unanimity among the different writers about the nexus between risk and uncertainty. Indeed, Hillson and Simon³⁵ assert that ‘everyone agrees that risk arises from uncertainty, and that risk is about the impact that uncertain events or circumstances could have on the achievement of goals’.³⁶ Knight³⁷ captures this relationship succinctly in his definition of risk:

‘But uncertainty must be taken in a sense radically distinct from the familiar notion of risk, from which it has never been properly separated. The term ‘risk’, as loosely used in everyday speech and in economic discussion, really covers two things which, functionally at least, in their causal relations to the phenomena of economic organization, are categorically different ... The essential fact is that ‘risk’ means in some cases a quantity susceptible of measurement, while at other times it is something distinctly not of this character; and there are far-reaching and crucial differences in the bearings of the phenomenon depending on which of the two is really present and operating ... It will appear that a measurable uncertainty, or ‘risk’ proper, as we shall use the term, is so far different from an unmeasurable one that it is not in effect an uncertainty at all.’³⁸

³⁵ Hillson, D. and Simon, P. (2012), ‘Practical Project Risk Management: The ATOM Methodology’ (2nd ed); Management Concepts (<http://www.atom-risk.com/books.html>).

³⁶ *Ibid*, at p.3.

³⁷ Knight, Frank H. (1921), *op cit*.

³⁸ *Ibid* at I.I.26 (<http://www.econlib.org/library/Knight/knRUP1.html#I.I.26>).

Other writers who establish the link between risk and uncertainty include Anderson *et al.*,³⁹ Harrison⁴⁰ and Holmes.⁴¹

Knight's construct draws a distinction between 'risk' and 'uncertainty', which he holds is the quantum of measurability of both concepts. Writers on the subject confirm the relationship between risk and uncertainty as stated by Hillson and Simon, but admit that the concepts are not theoretically identical. Althaus⁴² captures this difference in these words:

'The idea is that risk and uncertainty both relate to the unknown, but that risk is an attempt to "control" the unknown by applying knowledge based on the orderliness of the world. Uncertainty, on the other hand, represents the totally random unknown and thus cannot be controlled or predicted'.⁴³

Indeed, some writers – Brown *et al.*⁴⁴ and Pasternack⁴⁵ – have drawn a parallel between this representation of the 'unknown' with the now-famous statement credited to Donald Rumsfeld:⁴⁶

'Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are

³⁹ Anderson, B.F.; Deane, D.H.; Hammond, K.R.; and McClelland, G.H., (1981), Concepts in Judgement in Decision Research, Praeger, New York defined risk and uncertainty as 'A situation in which one knows only the probability of which of several possible states of nature has occurred or will occur'; cited in Maldonato, M. and Dell'Orco, S. (2011) *Natural Logic: Exploring Decision and Intuition*. Sussex Academic Press, p. 46.

⁴⁰ Harrison, E. F., 1995, The Managerial Decision-Making Process; Houghton-Mifflin, USA defined 'risk' as 'A common state or condition in decision making characterised by the possession of incomplete information regarding a probabilistic outcome', and 'uncertainty' as 'An uncommon state of nature characterised by the absence of any information related to a desired outcome'; cited in Macmillan, F. (2000) *Risk, Uncertainty and Investment Decision-Making in the Upstream Oil and Gas Industry*. Aberdeen University, p. 12.

⁴¹ Holmes, P., 1998, Investment Appraisal, International Thomson Business Press, London defines risk as 'A situation which refers to a state where the decision-maker has sufficient information to determine the probability of each outcome occurring' and uncertainty as 'A situation where the decision-maker can identify each possible outcome, but does not have the information necessary to determine the probabilities of each of the possibilities.' cited in Macmillan, F. (2000) *Risk, Uncertainty and Investment Decision-Making in the Upstream Oil and Gas Industry*. Aberdeen University, p. 12.

⁴² Althaus, C. E. (2005) 'A Disciplinary Perspective on the Epistemological Status of Risk', *Risk Analysis*, 25(3), at pp. 567– 588.

⁴³ *Ibid*, at p. 569.

⁴⁴ Brown, T., and Innocent, T (2013), 'Making Sense of Uncertainty – Why Uncertainty is Part of Science', *Sense About Science* at p.7.

⁴⁵ Pasternack, A. (2013), 'The Rumsfeld Uncertainty Principle', published online by Motherboard; <http://motherboard.vice.com/read/the-epistomologist-from-hell> accessed 24 February 2016.

⁴⁶ Donald Henry Rumsfeld is an American politician and businessman. He served as the 13th Secretary of Defense from 1975 to 1977, under President Gerald Ford, and as the 21st Secretary of Defense from 2001 to 2006 under President George W. Bush.

known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know.’⁴⁷

This concept of ‘unknown unknowns’ is equivalent to the *Black Swan* concept postulated by Taleb.⁴⁸ Taleb’s ‘*Black Swan*’ event is one that is impossible to predict, which nevertheless has a high impact upon occurrence. He disputes the theory that uncertainty can be measured, stating that the attempt to use mathematics to achieve this amounts to an ‘intellectual fraud’.⁴⁹ His view is that the better way to approach ‘*Black Swans*’, given their unpredictability, is to adjust to, and accept their existence, instead of attempting to predict or measure them.

1.1.2 Risk and Hazard

‘Risk’ has also been contrasted from ‘hazard’, even though these terms have been used interchangeably in some literature. For instance, the Compact Oxford English Dictionary for Students defines ‘hazard’ as ‘danger or risk of danger ...’⁵⁰ Ferguson *et al*⁵¹ define ‘hazard’ as ‘an agent of harm (e.g. HIV) and perceived risk is the subjective estimate that exposure to the hazard will be harmful’. This perception of hazard as a potential source of harm is also accepted by the Canadian Centre for Occupational Health and Safety, an agency of the Government of Canada. It defines ‘hazard’ as ‘any source of potential damage, harm or adverse health effects on something or someone under certain conditions at work’.⁵² Again, the Trades Union Congress

⁴⁷ Seely, H. (2010) *Pieces of intelligence: The Existential Poetry of Donald H. Rumsfeld*. Simon and Schuster, p.2. This statement was made in response to a question at a U.S. Department of Defense (DoD) news briefing on 12 February 2002 about the lack of evidence linking the government of Iraq with the supply of weapons of mass destruction to terrorist groups. Although Rumsfeld is credited with this statement, there are suggestions that this may not be original to him; William Robert Graham is thought to be the author of this phrase, and Rumsfeld himself admits as much in his memoir, *Known and Unknown: A Memoir* (2011), at p. xiv, where he states that he first heard a variant of the phrase ‘known unknowns’ from Graham.

⁴⁸ Taleb, N. N. (2007), *The Black Swan: The Impact of the Highly Improbable*. Random House.

⁴⁹ *Ibid*, at p. 2.

⁵⁰ *Supra*, at p. 465.

⁵¹ Ferguson, E., Farrell, K., Lowe, K. C. and James, V. (2001), ‘Perception of Risk of Blood Transfusion: Knowledge, Group Membership and Perceived Control’; *Transfusion Medicine*, Volume 11, Issue 2, pp 129–135, April 2001; <http://onlinelibrary.wiley.com/doi/10.1046/j.1365-3148.2001.00295-4.x/full>; accessed 24 February 2016.

⁵² Canadian Centre for Occupational Health and Safety, published online at https://www.ccohs.ca/oshanswers/hsprograms/hazard_risk.html accessed on 24 February 2016.

(TUC) of the United Kingdom approaches the distinction between risk and hazard by stating that ‘A hazard is something that can cause harm, e.g. electricity, chemicals, working up a ladder, noise, a keyboard, a bully at work, stress, etc. A risk is the chance, high or low, that any hazard will actually cause somebody harm’.⁵³

Flowing from the above, the New Health Advisor⁵⁴ ties it all together in its statement:

‘In essence, a hazard will not be risky unless you are exposed to enough of it that it actually causes harm; the risk itself may actually be zero or it may be greatly reduced when precautions are taken around that hazard. The simple relationship between the two is that you have to have exposure to a hazard to experience a risk. Thus, it is vital that you know the level of exposure you are going to have to the hazard to better understand how much risk is actually involved.’⁵⁵

From the definitions above, certain conclusions can be deduced. First, the distinction between risk and hazard that is self-evident from these definitions is the fact that hazard has a negative connotation, while risk could be either positive or negative. Secondly, it also seems fair to suggest that every risk that eventuates into a negative outcome is probably due to a hazard, but that not every hazard will eventuate into a risk properly so called, and especially if the right risk management measures are taken.

1.1.3 Risk and Probability

‘Risk’ has also been distinguished from ‘probability’. Although many definitions of risk are made with reference to probabilities – such as those of Anderson *et al*,⁵⁶ Harrison,⁵⁷ Holmes⁵⁸

⁵³ ‘What Is The Difference Between A Hazard and A Risk?’, WorkSMART, online publication by the , accessed at <https://worksmart.org.uk/health-advice/health-and-safety/hazards-and-risks/what-difference-between-hazard-and-risk> on 25 February 2016.

⁵⁴ ‘Difference Between Hazard and Risk’, online publication by the New Health Advisor, <http://www.newhealthadvisor.com/Difference-Between-Hazard-and-Risk.html> accessed 25 February 2016.

⁵⁵ *Ibid*, at <http://www.newhealthadvisor.com/Difference-Between-Hazard-and-Risk.html>

⁵⁶ Anderson, B.F.; Deane, D.H.; Hammond, K.R.; and McClelland, G.H., (1981), *Concepts in Judgement in Decision Research*, *supra*.

⁵⁷ Harrison, E. F., 1995, *The Managerial Decision-Making Process*, *supra*.

⁵⁸ Holmes, P., 1998, *Investment Appraisal*, *supra*.

and The Royal Society⁵⁹ – the two concepts can be distinguished theoretically. The Compact Oxford English Dictionary for Students defines ‘probability’ as ‘the extent to which something is likely to happen, or be the case ...’⁶⁰ One of the earliest attempts to define probability was made by Bernoulli,⁶¹ who suggested that probability is ‘a “degree of confidence” that an individual attaches to an uncertain event, and that this degree depends on the individual’s knowledge and can vary from individual to individual’. This approach takes the view of the subjectivity of probability, and is supported by Eisenberg,⁶² who states:

‘By probability ..., I mean the personal or subjective probability that a given actor assigns to the occurrence of a state, as opposed to the objective probability that the state will occur.’⁶³

However, writers such as Crovelli⁶⁴ have also approached the concept from an objective perspective, defining ‘probability’ as:

‘A measure of an objective, real, physical property of the world. According to this objective definition, we would conceive of probability as being something ‘out there’ in the world to be measured, recorded and analyzed in the same manner as we do with, for example, the hardness of different metals. Just as aluminium and cobalt have real physical differences that we can observe and measure, so too do things and events have different and real physical probabilities that we can observe and measure.’⁶⁵

A few deductions can be made. First, the ‘unknown’, which can be neither predicted, measured nor managed, is deemed to represent ‘uncertainty’. Secondly, ‘probability’ is the calculable

⁵⁹ The Royal Society (1992), ‘Risk: Analysis, Perception and Management’, *supra*.

⁶⁰ Compact Oxford English Dictionary for Students, 3rd ed (2006), *supra*., at p. 810.

⁶¹ Bernoulli, J., 1713, *Ars conjectandi tractatus de seribus infinitis*, Basel.

⁶² Eisenberg, M. A., ‘Probability and Chance in Contract Law’ (1998) 45 UCLA Law Review 1005.

⁶³ *Ibid*, at p. 1007.

⁶⁴ Crovelli, Mark R., ‘Why the Definition of Probability Matters’ (Mises Institute, January 26, 2011), <https://mises.org/library/why-definition-probability-matters> accessed 26 February 2016.

⁶⁵ *Ibid*, at <https://mises.org/library/why-definition-probability-matters>

likelihood that a certain risk event will occur, and the parameter for calculation could be ‘subjective’ or ‘objective’.

From a contractual risk allocation perspective, this study has already taken the position that risk is context-specific and context-dependent. Thus, any ‘uncertainty’ associated with ‘risk’ can be understood only within a specific context as well, and would relate more to the consequences rather than the event that precipitates them. For instance, a drilling contract contemplates that a blowout could occur. The factors that could cause a blowout, and the facts required to prove that it has indeed occurred, are known to the parties. However, the element of a blowout, howsoever caused, that is uncertain is the extent of damage and, importantly, the amount of money required to remedy this occurrence, which would be borne by the party to whom this risk has been contractually allocated.

Even in respect of the so-called ‘*Black Swan*’ events, the occurrence of the event is certain; the uncertainty is as to the economic consequence of the occurrence of the event. If, by their nature, these events are uncontrollable, unintended, unforeseen and unforeseeable, it follows that the real worry is as to consequences and, specifically, economic consequences, as someone will still ultimately bear the economic burden of the occurrence of the event.

Again, the probability factor is better conceptualised as the likelihood that a named party would be required to bear the economic burden of the consequences of an event, the focus being on the economic consequences rather than the event. This viewpoint is supported by the recent introduction of the financial assurance regulations relating to the offshore petroleum and gas industry by the Australian government⁶⁶ in response to the blowout at the Montara Wellhead

⁶⁶ Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (‘OPGGSA’) is the foremost legislation that regulates Australia’s offshore petroleum and gas industry. The financial assurance provisions of the OPGGSA were amended and came into effect in November 2013. By these amendments, a titleholder is required to maintain sufficient financial assurance, which empowers it to meet the costs, expenses and liabilities arising in connection with the carrying out of a petroleum activity (assured costs). The real purpose of the assured costs requirement is

Platform on 21 August 2009.⁶⁷ That legislation allocates the financial responsibility of a catastrophe to the titleholder and, in this way, risk is equated to the probability of an economic outcome, which is seen from the focus of the regulations on the requirement for the titleholder to maintain monies sufficient to pay for any damage arising from any event related to its petroleum authorisation. Thus, from the titleholder's or contract party's perspective, the real probability relates to the likelihood that he would be expected to make a payment for the consequences arising in the aftermath of an event, and this could be further granulated into the estimation of the sum of money likely to be expended.

This is also why parties take out insurance, which addresses the real focus of risk in this regard as it provides the guarantee that the named party responsible for the economic consequence can actually make the requisite payments if and when the event occurs.

1.2 Classification of Risk

In this section, the different ways in which risk can be classified are examined, starting with the overview of risks in general. These classifications highlight the risk factors that underpin the risk allocation mechanisms utilised in the drilling contracts which form the context of this study. For instance, pollution is an environmental risk that could arise in the course of drilling, and the parties would need to allocate this risk in a structured manner, utilising the risk allocation mechanisms discussed in this study. Similarly, the discussion of the views of the different schools of thought provide the foundation for examining the manner in which the courts

to ensure that a titleholder has sufficient funds to pay for any damage arising from any event related to its petroleum authorisation.

⁶⁷ The Montara oil spill occurred after a blowout and fire at the H1 well on the Montara wellhead platform (WHP) on 21 August 2009. The WHP is located in a remote area of the Timor Sea, approximately 250 km northwest of the Western Australian coast. Although no lives were lost, the oil leak continued for 74 days, until mud was pumped in to 'kill' the well following the successful drilling of an intervention well on 3rd November.

approached risk allocation in cases where the contract parties or legislation failed to make this stipulation. The perspectives of the *Economic* school of thought provide the background for the discussion on the efficiency of the manner of risk allocation adopted by contract parties which is fully examined in Chapter 4.

1.2.1 Overview of Risks

The attempt to classify risks would necessarily commence with an overview of the broad categorisation into the different *types* of risks possible. Although in-depth analysis of this categorisation is outside the scope or interest of this study, it is helpful to discuss the types of risks for completeness and to give context to the discussions that follow hereafter.

In this vein, this study will highlight the different types of risk following the PESTLEO⁶⁸ approach. This approach recognises that there are other broad categorisations of risk,⁶⁹ but the PESTLEO categorisation is preferred because of its wide coverage of all the risks arising from the drilling contract, especially the *operational* risks that are at the heart of this study.

Thus, *political* risk has been defined as arising from interference by government with the operations of an organisation, which leads to a conflict between that organisation's profit motive and the public interest.⁷⁰ It is the type of risk to which investors, governments and corporations are exposed, and is engendered by political decisions, conditions or events that impact the profitability or the anticipated return on investment. This interference is usually whimsical or

⁶⁸ PESTLEO stands for 'political, economic, social, technology, legal, environmental and operational' risks.

⁶⁹ Some commentators prefer to discuss risk based on different approaches such as ETPS ('economic, technical, political, and social'): Aguilar, F. J. (1967) *Scanning the Business Environment*. Macmillan. Other approaches include: SEPE analysis ('social, economic, political, and ecological' risks); and STEEPLED ('social, technology economic, environmental, political, legal, education and demographic' risks).

⁷⁰ Faruque, A. A. (2011) *Petroleum Contracts: Stability and Risk Management in Developing Countries*. Dhaka, Bangladesh: Bangladesh Institute of Law and International Affairs (BILIA), pp. 1– 340, at p. 64.

arbitrary, has the effect of jeopardising foreign investments⁷¹ and can occur at the macro or micro level of society.

At the macro level, the risk affects the entire spectrum of society and does not target any specific project or business.⁷² It usually manifests as government instability, currency volatility, war or insurrection, regulatory and fiscal amendment, and systemic corruption.⁷³ It is different from the micro-level political risk which is more project- or business-specific and would typically manifest as expropriation, nationalisation, contracts cancellation reneging on agreements.⁷⁴

Although some of these risks and actions arise in the ordinary course of government business, they may have profound implications on profitability, and sometimes affect the very essence of the contract. In recognition of this fact, most drilling contracts contain provisions that protect the parties from the undesired effects of political risks, and these would include change-in-law provisions that typically allocate the risk of any such change to the operator.

Economic risk arises when there are major changes in the economy that could impact the expected return on investment. This can be the result of changes in the goals of the country's economic policy or their comparative advantage.⁷⁵ Such changes occur at the macroeconomic level and manifest in conditions such as exchange rates and other government regulations. Sometimes, it also arises from political stability which can affect economic growth and confidence in the investment climate in the country.

⁷¹ Kinna, J. C. (1983) 'Investing in Developing Countries: Minimisation of Political Risk', *Journal of Energy & Natural Resources Law*, 1(2), at pp. 89– 99.

⁷² Alon, I. and McKee, D. (1999) 'Towards a Macro Environmental Model of International Franchising', *Multinational Business Review*, 7(1), at p. 76.

⁷³ See, generally, Lambrechts, D. and Blomquist, L. B. (2017) 'Political–Security Risk in the Oil and Gas Industry: The Impact of Terrorism on Risk Management and Mitigation', *Journal of Risk Research*, 20(10), at pp. 1320–1337.

⁷⁴ Faruque, A. A. (2011) *Petroleum Contracts: Stability and Risk Management in Developing Countries*, *supra*, at p. 65.

⁷⁵ UKESSAYS 2013. Political and Economic Risk Analysis Case Study Macedonia Economics Essay. November 2013 ed. Online: UK Essays.

At the micro-level, this risk relates to concerns that a project will not be commercially viable at a price that will offset its operating costs and service any debt obligations. It also relates to the organisation's ability to source for foreign exchange within a foreign country, and repatriate profits to the home country without undue restriction.

The potential impact to the drilling contract would also be in terms of the fiscal regime applicable to the contract. Parties would ordinarily take steps to allocate the risk of any changes in the fiscal regime, typically to the operator. Contract parties can also utilise the *force majeure* clause to mitigate any extended effect that an unforeseen change in economic policy can have on the contract.⁷⁶ Detailed discussion of *force majeure* is outside the scope of this study.

Social risks are the potential negative effects to an organisation arising from its operations as well as interaction with its stakeholders. These risks arise from the tension created by the organisation's value chain, and tend to be more prevalent and inevitable in extractive industries.⁷⁷ In their quest to achieve corporate objectives, organisations may impact local community and other stakeholders negatively, leading to reactions that may be disruptive to the organisation's activities or cause reputational repercussions.

The organisation responds to this risk by undertaking its activities in a socially responsible manner, which attempts to strike a balance between sustainability and profitability. The local communities and other stakeholders, including the relevant non-governmental organisations, must be engaged in a transparent and inclusive manner to address whatever concerns they have that fuel those tensions. Failure to manage this risk and the engagement process effectively may

⁷⁶ *Lebeaupin v Richard Crispin & Co.* (1920) 2 K.B. 714, at 719–720.

⁷⁷ Faruque, A. A. (2011) *Petroleum Contracts: Stability and Risk Management in Developing Countries*, *supra.*, at p. 232.

lead to blockades, riots, negative publicity and, in extreme cases, threat to life and property. These conditions may give rise to the need to shut out stakeholders and protect the business and its people by utilising security services, which could lead to human rights abuses, further compounding the organisation's problems, and denying it the *licence to operate*.⁷⁸

Within the context of the drilling contract, it is the operator's responsibility to ensure that engagement with the host communities is carried on as detailed above. In addition, the contract parties would typically embark on community-nominated projects as part of their corporate social responsibility – activities that demonstrate their commitment to improving the lot of the local community while minimising the impact of their activities thereto.⁷⁹

Technology risk is any potential for technology challenges to affect business, usually through service outages, regulatory non-compliance or breach of data integrity.⁸⁰ Technology is crucial to supporting business activities in every sector of the economy, is an enabler for growth, innovation and market penetration, and can significantly reduce cost if deployed correctly. Reducing risk in this regard is a priority for businesses that depend on technology for different aspects of their value chain.

These risks arise from different sources, and can be categorised as general risks, criminal risks or risks emanating from natural disasters.⁸¹ General risks manifest as viruses, spams, hardware or software malfunctions, or plain human error. Criminal risks emanate from hackers, fraudulent

⁷⁸ Also known as 'LTO', it represents the acknowledgment that an organisation has satisfied the requirements and conditions of the host community that entitles it to commence its extractive or manufacturing activities.

⁷⁹ See, generally, Jamali, D. and Mirshak, R. (2007) 'Corporate Social Responsibility (CSR): Theory and Practice in a Developing Country Context', *Journal of business ethics*, 72(3), at pp. 243–262.

⁸⁰ PwC (2017) *Technology Risk*. Online: PwC Network. Available at: <https://www.pwc.co.uk/careers/student-jobs/work-for-us/graduateopportunities/technology/digital-trust.html>, accessed 6 December 2017.

⁸¹ Queensland Government. (2016) *What is an Information Technology Risk?* Business Queensland Online: Queensland Government. Available at: <https://www.business.qld.gov.au/running-business/protecting-business/risk-management/it-risk-management/defined>, accessed 6 December 2017.

acts including stealing technology, dishonest or disgruntled staff or from password thefts. Natural disasters such as floods, fire and excessive heat can destroy or corrupt data or even the entire information technology architecture. These risks have a negative impact on the organisation, and can cause varying levels of disruption to its activities.

Organisations can address these risks by ensuring that they have *business continuity plans* in place. These plans would typically include risk management plans which include measures to mitigate the effect of any of the risk events occurring. They would also detail the nature of systems, firewalls and other protective measures to be implemented to safeguard the organisation. The drilling contract would typically contain clauses requiring confidentiality of its contents, as well as prohibition from unlawful access. Both parties would be in breach of their obligations under the contract if they failed to implement information technology systems which preserved the confidentiality of the contract and impugns the integrity of its contents.

Legal risk arises from financial or reputational exposure to legal rules and regulation that impact the organisation, its procedures, relationships and market offerings, through either a misunderstanding or lack of awareness of the applicable rules and regulation, or by not taking due care to obtain the requisite knowledge and information.⁸² This exposure can relate to any of the organisation's processes, but goes beyond these, as the conduct of individuals within the organisation can also trigger legal risk. It can also arise from a failed transaction, a claim or counterclaim, negligence in protecting company assets or from a change in law.⁸³

⁸² Ernst & Young (2016) *Legal Risk 2.0: Show You're in Control*. Online: EYGM Ltd. Available at: [http://www.ey.com/Publication/vwLUAssets/ey-legal-risk-2-show-you-are-in-control/\\$FILE/ey-legal-risk-2-show-you-are-in-control.pdf](http://www.ey.com/Publication/vwLUAssets/ey-legal-risk-2-show-you-are-in-control/$FILE/ey-legal-risk-2-show-you-are-in-control.pdf), accessed 6 December 2017.

⁸³ McCormick, R. (2010) *Legal Risk in the Financial Markets*. Oxford University Press on Demand, at paras 17.20 – 17.31.

A significant legal risk that has emerged in recent times is the possibility of litigation in the home countries of transnational corporations by aggrieved members of the local population who feel that they are unable to get justice in their local courts. These actions usually border on alleged human rights abuses or environmental pollution or degradation, and litigants can bring these actions based on the universal jurisdiction conferred by international law in certain circumstances relating to the contentious matters.⁸⁴ Even though transnational organisations can sometimes defeat the claims in the courts of their home countries based on jurisdiction or procedural defects, the real cost of this exposure lies in the significant cost of defending these actions, the negative publicity, potential impact on their stock prices and the possibility of an out-of-court settlement with the aggrieved local community with which they still need to deal on an on-going basis.

Within the context of the drilling contract, an additional risk exposure stems from the litigation that could be brought by either party, perhaps based on a disagreement arising from the method of risk allocation or any other matter encountered during drilling operations. For instance, if parties have stated that liability would attach if wilful misconduct of supervisory personnel is established in certain circumstances, it becomes a contentious exercise to determine whether indeed the subject conduct fell short of the expectations of the contract, for which liability would attach.

Environmental risk is the potential or actual threat of negative consequences on the environment, and living organisms, engendered by the activities of any entity, including an organisation, through wastes, resource utilisation and depletion, effluents, and emissions. These activities expose plants and animals – including humans – to chemical, biological or physical harm, and

⁸⁴ For instance, in *His Royal Highness Okpabi v Royal Dutch Shell Plc and the Ogoni Community* (2017) EWHC 89 (TCC), claimants from Nigeria brought an action in the UK court against the parent company of the Shell organisation in Nigeria based on the activities of Shell Petroleum Development Co (SPDC), Nigeria.

may impact air, water, or soil quality, sometimes affecting entire ecosystems.⁸⁵ Environmental laws and regulations impact the entire value chain of the extractive industry, with a plethora of compliance requirements. Given the vast number of conditions and legislation to be satisfied, there is a possibility that organisations may fail to comply with some of them, making environmental risk an exposure that most organisations face and would have to develop systems, processes and procedures to deal with.

Compliance with the environmental regulatory requirements is not cheap. Neither is non-compliance. Indeed, in recent times, this regulatory regime has attracted global attention, arising from greater awareness of the general populace as to what compliance standards are, and increased interest in ensuring that organisations undertake their activities in a way that is not harmful to the planet. Businesses now have to factor in environmental compliance costs as an integral part of doing business, particularly in the extractive industries.⁸⁶ Where they have failed to comply, there are stiff penalties and sanctions that attach to a finding of liability.⁸⁷

Within the context of the drilling contract, parties would typically allocate the risk of environmental pollution and non-compliance *inter se*, and the responsibility for bearing the economic consequences of pollution would depend on the causal factor, and from where it occurs.⁸⁸ Furthermore, there are other compliance requirements – for instance the responsibility to obtain appropriate permits and licences for the drilling operations – which are allocated

⁸⁵ Crawford Global Technical Services (2017) *Environmental Risk: Defined*. Online: Crawford Global Technical Services. Available at: <https://crawfordgts.com/services/environmental-risk/environmental-risk-defined.aspx> accessed 7 December 2017.

⁸⁶ Faruque, A. A. (2011) *Petroleum Contracts: Stability and Risk Management in Developing Countries*, *supra*, at pp. 211–217.

⁸⁷ Council, S. (2014) ‘Environmental Offences: Definitive Guidelines’, *Londres, Royaume-Uni: Sentencing Council*. This document prescribes the applicable penalties to be meted out to organisations that engage in unauthorised or harmful deposit or treatment of waste and other offences.

⁸⁸ See, for instance, BP agreed to settle all the claims arising pursuant to the Macondo blowout for \$21 billion – Gilblom, K. and Jordan, A. (2018) ‘BP’s \$60 Billion Gulf Spill Tab Rises as Lawsuits Wind Down’, *Bloomberg Quint*; Bloomberg LP. Available at: <https://www.bloombergquint.com/business/2018/01/16/bp-takes-1-7-billion-charge-on-deepwater-horizon-claims-closure>, accessed 21 January 2018.

between the parties. Environmental responsibilities and compliance requirements are discussed in the study.

Operational risk arises from the potential of loss due to people and/or systems error, inadequate and/or failed internal processes, or from external events.⁸⁹ This exposure manifests as tax evasion, corruption, insider trading, harassment and discrimination, accounting errors, data entry and processing mistakes, vandalism and terrorism, among others. Indeed, since *operations* cuts across the entire value chain of an organisation's activities, the potential for risk is present in each transaction.

Unlike other types of risk, operational risk can never really be eliminated because it arises from human beings, systems and processes that are inherently imperfect. Thus, it is fair to say that it is inevitable that operational risk events will occur, and so an organisation must put measures in place to reduce the scope, extent, frequency and impact of their occurrence. For instance, an organisation can set the level of exposure it is willing to absorb or tolerate from operational risks, and this is derived by balancing the costs of implementing additional controls that mitigate the exposure against the expected benefits of doing this, on one hand, and the potential cost of consequences if no additional measure is implemented, on the other hand.⁹⁰

Operational risks are rife within the context of the drilling contract. The exposure to the risk can be attributed to the acts or omissions of the contract parties – the operator and contractor – or their respective contractors and/or employees. Thus, the drilling contract anticipates this and allocates the economic consequences of the occurrence of the risk events *inter se* accordingly. For instance, human errors during drilling operations can arise due to incompetence of

⁸⁹ Basel Committee (2011) 'Principles for the Sound Management of Operational Risk', *Basel, Switzerland: Bank for International Settlements Communications*, at p. 3.

⁹⁰ Basel Committee (2011) 'Principles for the Sound Management of Operational Risk', *supra*, at pp. 5 – 6.

employees, negligence, or wilful misconduct. These causal factors, together with how they are dealt with in the drilling contract, are fully discussed in this study.

1.2.2 Positivist and Constructionist Schools

The overview in the foregoing section lays the foundation for the discourse on the theoretical foundations of risk. As might be expected, there are several approaches to risk, with different writers proposing diverse risk classifications. In this regard, Renn⁹¹ classifies risk approaches into two schools of thought – *positivist* and *social constructionist*. The positivist classification sees risk as ‘an objective property of an event or activity, and measured as the probability of well-defined adverse effects’.⁹² This classification aggregates approaches that view risk as objective measures of probability and magnitude of harm, and ranks them accordingly, enabling resources to be allocated to address greater risks first. The views of writers such as Knight⁹³ and Anderson *et al*⁹⁴ would fit into this class.

The social constructionist view sees risk as ‘a cultural or social construction, to be dealt with according to different criteria’.⁹⁵ In this construct, and unlike the positivist class in which risk prioritisation is based on objective criteria, the social constructionist view consists of approaches in which risk priorities are determined by reference to subjective phenomena such as values and lifestyle preferences. The views of writers such as Clark *et al*⁹⁶ and Short⁹⁷ belong to this class.

⁹¹ Renn, O. (1992) ‘Concepts of Risk: A Classification’ in Sheldon Krinsky and Dominic Golding (eds), *Social Theories of Risk*, Praeger Publishers, 1992.

⁹² *Ibid*, at p. 54.

⁹³ Knight, Frank H. (1921), ‘Risk, Uncertainty, and Profit’ *Op.Cit.*, at p. 54.

⁹⁴ *Ibid*, at p.54.

⁹⁵ Anderson, B.F.; Deane, D.H.; Hammond, K.R.; and McClelland, G.H., (1981), *Concepts in Judgement in Decision Research*, *supra*.

⁹⁶ Clarke, L. and Short Jr, J. F. (1993) ‘Social organization and risk: Some current controversies’, *Annual Review of Sociology*, at pp. 375– 399.

⁹⁷ James F. Short, Jr, ‘The Social Fabric at Risk – Towards the Social Transformation of Risk Analysis’, (1984) *American Sociological Review*, Vol. 49, 711–725.

Lupton⁹⁸ proposes another classification into three epistemological groups: The first of these is ‘*realists*’, who view risk as ‘an objective hazard, threat or danger that exists, and can be measured independently of social and cultural processes’.⁹⁹ This grouping is conceptually similar to the positivist school discussed earlier and, by extension, the writers already identified.

The second class identified is the ‘*weak constructionist*’ group who conceptualise risk as ‘an objective hazard, threat or danger, that is inevitably mediated through social and cultural processes, and can never be known in isolation from these processes’.¹⁰⁰ Closely related to the second group is the third group which Lupton calls the ‘*strong constructionist*’ class and which states that ‘nothing is a risk in itself, but what is understood as hazard, threat or danger is a product of historically, socially and politically contingent “ways of seeing”’.¹⁰¹

The constructionists essentially argue that everything that is known about risk is inevitably bound up with our everyday experiences, and that the notion of risk being objective is a misnomer. Even the so-called expert opinions and studies are ultimately the product of social and cultural processes, and must be understood from that perspective. The difference between the weak and strong positions espoused above is essentially in the extent to which cultural and social processes view the ‘hazard’ or harm element objectively. So, while the ‘weak’ position accepts that risk could in itself be based on objective phenomena, it is only given expression, understanding and application within the socio-cultural context. The ‘strong’ position maintains the socio-cultural influence but challenges the objective nature of risk.

Althaus¹⁰² approached her classification from an epistemological perspective, exploring how different disciplines view risk. Althaus postulates that ‘each discipline applies a particular form

⁹⁸ Lupton, D., *Risk* (1999); London: Routledge.

⁹⁹ *Ibid*, at p. 35.

¹⁰⁰ *Ibid*, at p. 30.

¹⁰¹ *Ibid*, at p.35

¹⁰² *Op Cit* at p. 569.

of knowledge to uncertainty so as to order its randomness, and convert it into a risk proposition'.¹⁰³ In this regard, she presented the world view from several disciplines, as well as what form of knowledge each applied to uncertainty to discern their construct of risk. Although she does not classify the disciplines¹⁰⁴ into broad categories based on their approaches to risk, it is possible to align individual approaches with already discussed classifications. For instance, science and medicine apply principles and calculations to uncertainty and thus view risk as an objective reality, just like logic and mathematics.¹⁰⁵

In this regard, it can be safely deduced that these two disciplines would belong to Renn's positivist school or Lupton's realist school, and would include writers such as Burke,¹⁰⁶ Cole,¹⁰⁷ and Adams,¹⁰⁸ among many others. Anthropology and sociology which respectively apply 'culture' and 'social constructs' to uncertainty and view risk as a cultural phenomenon, would conceptually belong to the constructionist school.

1.2.3 Economics School

It is important to examine one of the disciplines proposed – economics – in more detail because of the important nexus that it has with this study, and the implications this worldview has on the approach adopted in this study. Accordingly, Althaus¹⁰⁹ states that the economics discipline views risk as just another resource to be allocated and distributed. The proponents of this view contend that this perspective of risk focuses on reward and incentive, and is tied to monetary

¹⁰³ *Ibid*, at p. 569.

¹⁰⁴ The disciplines are: *Logic and Mathematics; Science and Medicine; Social Sciences (Anthropology, Sociology, Economics); Law; Psychology; Linguistics; History and the Humanities; the Arts; Religion and Philosophy.*

¹⁰⁵ *Ibid*, at p. 569.

¹⁰⁶ Burke, J. (1991). *Chances: The Probability Factors of Life*, London: Virgin Books.

¹⁰⁷ Cole, L.A. (1993). *Element of Risk: The Politics of Radon*. Washington: AAAS Press.

¹⁰⁸ Adams, J. (1995), *Risk*; London: UCL Press. Accessed online at <https://www.questia.com/read/103322786/risk>

¹⁰⁹ *Op.Cit* at p. 573. Althaus cited other writers: Aharoni, 1981; Hardy, 1931; Segerson, 1992; Viscusi, 1992.

value and utility. Importantly, risk is deemed to be voluntarily taken, while any involuntary risk that threatens security should be insured. Renn¹¹⁰ agrees, and posits that:

‘Economic theory perceives risk analysis as part of a larger cost-benefit consideration, in which risks are the expected utility losses resulting from an event or an activity. The ultimate goal is to allocate resources so as to maximise their utility for society’.¹¹¹

Extending the cost-benefit argument, Fischhoff, Lichtenstein, *et al*¹¹² make the connection between this (cost-benefit analysis) and probabilities, decision-analysis and uncertainty. In this vein, they state that ‘probabilities’ are actually uncertainties about the present and future state of affairs, and that both cost-benefit analysis and decision analysis are based on probabilities.¹¹³ The difference, however, is that while decision analysts view probabilities as expressions of individual beliefs, and are therefore judgements of the decision maker, cost-benefit analysis is based on more objective criteria.¹¹⁴

This study views some elements of the constructionist perspective of risk as being closely aligned with the position already adopted herein. The constructionists agree that risk is context-specific and derives meaning from socio-political processes. However, their focus is still on events rather than on consequences; this is where their view contrasts with this study which views the real focus as being on economic consequences of the occurrence of the event.

The economic view presents the most realistic picture of what is actually happening as far as contractual risk allocation is concerned. The concept of risk as losses/resources capable of being

¹¹⁰ *Op.Cit*, at p. 62, citing Smith, V. K. 1986, “A Conceptual Overview of the Foundations of Benefit-Cost Analysis” In J. D. Bentkover, V. T. Covello, and J. Mumpower, eds. *Benefits Assessment: The State of The Art*. Dordrecht: Reidel, 13–34.

¹¹¹ Ortwin Renn (1992), *Op.Cit* at p. 62.

¹¹² Fischhoff, B.; S. Lichtenstein; P. Slovic; S. L. Derby; and R. L. Keeney. 1981. *Acceptable Risk*. Cambridge, Eng. Cambridge University Press, 106 – 109. Accessed online at https://scholar.google.co.uk/scholar?q=Fischhoff%2C+%27Accepting+Risk%27&btnG=&hl=en&as_sdt=0%2C5&as_vis=1 on 29 February 2016.

¹¹³ *Ibid*, at p. 106.

¹¹⁴ *Ibid*, at p. 109.

allocated is evidence of the focus on the economic consequences of the occurrence of the event, rather than events, as events cannot be conceived as resources. Indeed, the occurrence of the event is the trigger actually to allocate the resources. From this perspective, the focus is on implications of risk which can be measured in economic terms.

Indeed, when parties estimate, on average, how much they could potentially be expected to pay if a risk event occurs, they are, by extension, calculating the *expected value*¹¹⁵ of the consequence of the event occurring, and this is one of the tools that insurers also utilise in order to arrive at the right premium to cover the relevant risk.

As this study has discussed, risk allocation in a drilling contract proceeds on certain assumptions, among which is the fact that risk is allocated to the party best able to manage it. In reaching a determination of ability to bear the risk, risk appetite¹¹⁶ of the parties is one of the factors taken into consideration. Since risk appetite is a product of qualitative and quantitative parameters, parties could actually arrive at their preferred level of risk appetite leveraging the economic approach. Importantly, since this approach contemplates risk as a resource that can be allocated, parties are inevitably engaged in this process when they are negotiating their drilling contract, and seeking to confer advantages upon themselves, and taking on risks with the hope that their strategies will yield the expected dividend.

1.3 Judicial and Legislative Approaches to Risk

¹¹⁵ The expected value of a situation with financial risk is the measure of how much you would expect to win (or lose) on average, if the situation were to be replayed many times. See, generally, Mian, M. A. (2011) *Project Economics and Decision Analysis: Deterministic Models*. Pennwell Books, at p. 181.

¹¹⁶ KPMG Australia has defined this concept in these terms '*the amount of risk, on a broad level, that an organisation is willing to take on, in pursuit of value*'. They also confirm that qualitative factors (such as defining risk categories and setting target levels around these), as well as quantitative models could be utilised in arriving at the risk appetite an organisation is comfortable with. KPMG Australia, *Understanding and Articulating Risk Appetite*, (Advisory Paper, 2008); accessed online at <https://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/Risk-appetite-O-200806.pdf> on 29 February 2016.

1.3.1 Judicial Approach

Given the differing approaches to risk, this study will be guided by the approach of the courts to risk in general. Since the courts reach decisions based on their interpretation of the law, this discussion is inevitably tied to the legislative approach to risk as well. In this regard, Ewald¹¹⁷ opines that law conceptualises risk as ‘an event—potential or actual—that creates disorder, of a detrimental and often serious kind, and where there is an identifiable victim and perpetrator’.¹¹⁸ This view of risk is fault based, which leads the courts to focus on accountability and responsibility for the errant conduct, leading to imposition of fines, other sanctions or damages, depending on the nature of the infraction and the status of the perpetrator.

Huber¹¹⁹ suggests that these risks can be categorised into public¹²⁰ and private¹²¹ categories. Following this categorisation, the courts have been accused of being too controlling and deterring of public risk, and being unduly biased in favour of tightening the process around cases involving perceived public risk.¹²² In support of this position, the courts have been accused of whittling down the onus on the claimant to prove injury,¹²³ thereby enabling more claimants to succeed in their actions, with the potential of further constraining or eliminating risk taking, which compromises the upside of risks in general.

¹¹⁷ Ewald, F. (1991). ‘Insurance and Risk’. Accessed online http://lchc.ucsd.edu/cogn_150/Readings/ewald/ewald.pdf on 3 March 2016.

¹¹⁸ Cited by Althaus, C. E. (2005) ‘A Disciplinary Perspective on the Epistemological Status of Risk’, *Risk Analysis*, 25(3), at pp. 567–588.

¹¹⁹ Huber, P. (1985) ‘Safety and the Second Best: The Hazards of Public Risk Management in the Courts’, *Columbia Law Review*, 85(2), p. 277.

¹²⁰ Public risks have been defined as manmade threats to human health or safety that are centrally or mass-produced, broadly distributed, and largely outside the individual risk bearer’s direct understanding and control, *ibid*, at p. 277.

¹²¹ ‘Private risks’ in contrast, are either of natural origin or, if man made, produced in relatively discrete units, with local impacts more or less subject to personal control: *ibid*, at p. 278.

¹²² Gillette, C. P. and Krier, J. E. (1990) ‘Risk, Courts, and Agencies’, *University of Pennsylvania Law Review*, 138(4), pp. 1027–1109, at 1043.

¹²³ See, e.g., *In re ‘Agent Orange’ Prod. Liab. Litig.*, 597 F. Supp. 740, 758–59 (E.D.N.Y. 1984) (involving the court’s approval of class action settlement despite difficulty in proving causation): *ibid*, at p.1043.

Vig and Bruer¹²⁴ agree that the focus of the courts is on public risks, and opine that, even when they focus on private risks, the aim is to determine circumstances in which private actions might warrant injunctive intervention to safeguard public health and welfare. They argue that the courts previously adopted an *ex post facto* approach (after actual injury has occurred) to assessing damages and establishing culpability. However, this is changing, as courts no longer restrict themselves to past and present risks, but also consider future risks, and balance conflicting interests between present benefits and anticipated risks.¹²⁵ As far as interpreting legislation is concerned, the task of the courts is to discern legislative intent and adjudicate in risk-related matters, making a judgment call on risk/benefit trade-offs, using the law as a tool of social engineering to safeguard the public in respect of potential risk-laden circumstances.

Other writers¹²⁶ on regulation agree with the notion of public risk, view risk in adverse terms, confirm its probabilistic nature, which is not always calculable, and posit that regulatory ‘interference’ in market dynamics is with the aim of safeguarding public health.¹²⁷

1.3.2 Legislative Approach

The legislative approach to risk is, perhaps, the precursor of the judicial attitude to same. Shapiro and Glicksman¹²⁸ argue that legislative intervention is primarily for the purpose of harm prevention to the populace, and that a school of thought finds that this is underpinned by a utilitarian philosophy supported by cost–benefit analyses. From this perspective, the objective

¹²⁴ Vig, N. J. and Bruer, P. J. (1982) ‘The Courts And Risk Assessment’, *Review of Policy Research*, 1(4), at pp. 716–727.

¹²⁵ *Ibid.*, at p. 716.

¹²⁶ These other writers include Christopher Hood, Henry Rothstein, Robert Baldwin (2001); Robert Baldwin, Christopher Hood, Colin Scott (1998).

¹²⁷ Hood, C., Rothstein, H. and Baldwin, R. (2001), *The Government of Risk: Understanding Risk Regulation Regimes*. Oxford University Press.

¹²⁸ Shapiro, S. and Glicksman, R. (2002) ‘*Risk Regulation at Risk: Restoring a Pragmatic Approach*’. Stanford University Press.

of legislation is essentially to identify and reduce the potential causes of harm before they eventuate.¹²⁹ They acknowledge another school of thought that rejects *utilitarianism* as the philosophical basis for this approach to risk, preferring instead *pragmatism* as the motive that drives risk regulation.¹³⁰ Farber¹³¹ is a proponent of the latter approach, insisting that pragmatism is a better rationale, as it combines creativity with respect for extant legal tradition.¹³²

1.3.3 *Economic Approach*

Unlike other judicial and legislative approaches to risk that focus on harm and undesirable consequences, Posner¹³³ has attempted to correlate market behaviour, resource allocation and the legal system, and so conceptualises risk from a cost and utility perspective. In his view, risks are measured in terms of transactional costs, as well as the utility or disutility resulting from a given event. The objective is to achieve transactional efficiency, and this can be done by determining which party is best situated to bear the risk.¹³⁴ In order to minimise transactional cost (and by extension, risk), parties must be adequately incentivised, transactions must be simplified and information sharing must occur to guarantee an informed exchange.¹³⁵

According to Posner, the notion of determining the party that is best able to bear a given risk is shorthand for placing risk on the party who can bear it cheapest.¹³⁶ In this study's construct, this would mean placing the obligation to bear the economic consequences of the occurrence of a given event on the party who can deal with this more cost-effectively. Loosemore and

¹²⁹ *Ibid*, at p. 1.

¹³⁰ *Ibid*, at p. 1.

¹³¹ Farber, D. A. (1987) 'Legal Pragmatism and the Constitution', *Minn. L. Rev.*, 72, p. 1331.

¹³² *Ibid*, at p. 1337.

¹³³ Posner, R. A. (1986) *Economic Analysis of Law*. Little, Brown and Co.

¹³⁴ Diamond, P. A. (1974) 'Posner's *Economic Analysis of Law*', *The Bell Journal of Economics and Management Science*, 5(1), at pp. 294–300.

¹³⁵ *Ibid*, at p. 298.

¹³⁶ Posner, R. A. (1986), *supra* at p.44.

McCarthy¹³⁷ agree, and focus on the capacity of a party to bear a given risk. From their perspective, capacity is determined by access or ownership of resources with which to deal with the risk, if the event occurs. This would entail having the right level of expertise and authority, and the resources with which to implement other risk management strategies that ensure that contract objectives are met.¹³⁸ Atiyah views this as the party who is able to take action to avoid the risk event from occurring.¹³⁹ The exercise of determining the party best able to bear a given risk is not merely theoretical, as optimal transactional costs lead to better terms for the consumer.

The focus on cost-effectiveness of risk allocation is self-evident, not just in respect of transactional costs, but also in terms of information exchange between parties. Thus, Posner considers what efficient disclosure of information between parties would be, and concludes that the party who is best able to give or obtain information more efficiently should do so. His position, however, recognises that parties might have a disincentive to disclose information adverse to their interests, and so informational inefficiencies might inevitably be created because of this.¹⁴⁰ He also focuses on information exchange between parties utilising standard term contracts, and surmises that optimality is attained when good exchange engenders competition that leads to the inclusion of terms that maximise transaction benefits for the consumer.¹⁴¹

The essence of this approach can be seen in a drilling contract, as risk allocation should ultimately be about parties allocating the economic consequences of the occurrence of events between themselves in a manner that ensures allocation to the party who is best able to bear the risk – that is, best able to manage the likelihood of the occurrence of the event and, if it occurs, the economic consequences of the event occurring. The manner of determining this then

¹³⁷ Loosemore, M. and McCarthy, C. (2008) 'Perceptions of Contractual Risk Allocation in Construction Supply Chains', *Journal of Professional Issues in Engineering Education and Practice*, 134(1), at pp. 95–105.

¹³⁸ *Ibid*, at p.95.

¹³⁹ Atiyah, P. S. (1990) *Essays on Contract*. Oxford University Press, at p. 36.

¹⁴⁰ Posner, R. A. (1986), *supra* at pp. 48–49.

¹⁴¹ *Ibid*, at p.54.

becomes crucial, and parties would need to co-operate and share information transparently about risk profile, risk appetite and insurance to aid this process. If this is not done, it is doubtful that transactional efficiency contemplated by Posner would be achieved, leaving both parties in a sub-optimal risk allocation situation.

1.3.4 Commentary

Based on the above, one can summarise that the judicial and legislative attitude to risk would depend on the character of the risk in question and, in particular, as to whether it affects the wider populace or only parties to a contract. As it relates to the so-called ‘private’ risks (which is more the focus of this study), it is also fair to state that the attitude of the courts and the legislature in apportioning blame and determining culpability, which entitles the non-defaulting party to a remedy, is consistent with the stance of law encapsulated in the maxim ‘*ubi jus ibi remedium*’.¹⁴² Justice Marshall¹⁴³ captured the essence of this maxim in an opinion expressed in *Marbury v Madison*¹⁴⁴ to the effect that there must be a remedy to every legal right.

Irrespective of the philosophical leaning of the different commentators¹⁴⁵ on the judicial and legislative approaches to risk, this study finds that the right to remedy in the face of injury or fault (whether this fault is occasioned by commission, omission or operation of law), underlies the attitude of the courts and legislature in this regard.

¹⁴² ‘Where there is a right, there is a remedy’. For further reading on the maxim, see Thomas, T. (2004) in ‘Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process’, accessed online from the Social Science Research Network Electronic Library at <http://ssrn.com/abstract=564302> on 6 March 2016.

¹⁴³ Thurgood Marshall was an Associate Justice of the Supreme Court of the United States, serving from October 1967 until October 1991. Marshall was the Court's 96th justice and its first African–American justice.

¹⁴⁴ 5 U.S. (1 Cranch) 137, 163–66 (1803).

¹⁴⁵ Posner, from an economic perspective, states that if ‘law fails to provide a remedy if a breach occurs, it will have induced a misallocation of resources by discouraging an exchange in which the performance of one party is deferred. He also opines that the function of contract law is to deter people from behaving opportunistically towards their contracting party’. *Op.Cit*, at pp 80, 81.

As far as risk allocation is concerned, this study takes the view that the journey begins when the courts are called upon to interpret a contract, to reach a determination on the allocation of economic consequences of the occurrence of an event between the parties. Rising to this occasion, the courts have several tools available to them, including, but not limited to: *rules of interpretation* and recourse to the *default legal position* and *common law*. The outcome is a method of risk allocation in the specific instance between specific contract parties. However, the decision also indicates the path that the courts may take in future if similar circumstances and/or events occur, and by which other parties may be bound, in keeping with the principle of *stare decisis*, and especially if the decision is handed down by a superior court of the jurisdiction. These tools are discussed in detail in the course of this study.

The parties may seek a different outcome and/or interpretation on future occasions, and take steps to reflect this intent in their contract. This may sometimes entail the specific exclusion of the application of a rule or principle that the courts would otherwise have applied. There are also tools available to parties in their risk allocation function. Thus, *indemnities*, *mutual hold harmless* and *exemption clauses* are some strategies that could be utilised to achieve this intent. These tools are also discussed in detail in a different section of this study.

Public policy considerations or the need to use the law as a tool of social engineering may necessitate the intervention of the legislature to make laws that address risk allocation, and that effectively remove parties' discretion in this regard. There is legislation that targets contractual risk allocation, and this is discussed in detail, with emphasis on the behaviour of the parties that the legislation intervened to truncate.

As previously discussed, where the manner in which the economic consequences of the occurrence of an event are being allocated could create a disequilibrium in society, and/or

otherwise threaten societal cohesion, legislative intervention is seen as necessary to safeguard the public space from perceived negative private interests and opportunistic behaviour.

1.4 Risk Allocation as a Risk Management Strategy

1.4.1 Definition of ‘Risk Management’

Although there is no generally accepted definition of ‘risk management’, different approaches have been propounded in literature on the subject. Masham¹⁴⁶ sees it as a mechanism for identifying, evaluating, treating and administering risks that threaten the survival of a business by eliminating benefits derived from assets.¹⁴⁷ This approach recognises that preventive measures are required to be implemented to ensure that risk events do not occur and/or escalate.

From a public policy perspective, the Royal Society postulates that risk management is the strategy for quantifying risks inherent in an event, and evaluating the possible benefits therefrom.¹⁴⁸ In project management, risk management is viewed as planning, identifying, analysing and controlling risk in a given project.¹⁴⁹ Its stated aim is to increase the chances of occurrence of positive outcomes, while simultaneously seeking to reduce negative outcomes.¹⁵⁰

The following inferences can be drawn from the foregoing approaches: risk management is a process; it is systematic – involving a series of specified steps; it aims to engender desirable outcomes from events and/or actions; and it is also context-specific. It is instructive to note that all the approaches state that the risk management process aims at resulting in desirable

¹⁴⁶ Masham, D. (1992) ‘What Are Risk Management and Insurance?’ in *Managing Risks of Investments in Developing Countries*; Industry and Energy Department Working Paper (Energy Series Paper No. 55), at pp. 9–12.

¹⁴⁷ *Ibid*, at p. 10.

¹⁴⁸ The Royal Society (1992), *Op.Cit*.

¹⁴⁹ ‘A Guide to the Project Management Body of Knowledge (PMBOK® Guide)’, *Op.Cit*, at p. 309.

¹⁵⁰ *Ibid*, at p. 309.

consequences. This study posits that the ultimate objective of risk management is to ensure that a desirable economic consequence is achieved, given the occurrence of certain events; in effect, the risk management process attempts to reduce the likelihood of the occurrence of an event of which a party would be obliged to bear the economic consequence, by making payment in respect of a liability that has been allocated to him or, where this is inevitable, to procure that the amount of money to be paid is reduced to the lowest possible in the specific circumstance.

1.4.2 Risk Management Process

The constituent steps of the risk management process have also been expressed in different terms. For instance, Valipour *et al*¹⁵¹ state that risk management has four main steps: *risk identification, assessment, allocation and reduction*.¹⁵² Their position is that risk allocation, which essentially means that the party best able to bear the risk should assume that responsibility, is a crucial step in the risk management process, given the fact that it optimises risk sharing.¹⁵³ In this context, this study infers that the party best able to bear a given risk is the one who is better able to reduce the likelihood of the occurrence of the risk event, and/or who is better able to deal with the economic consequences if it does occur. Valipour *et al* also view risk allocation as a strategy of risk management to the extent that it can be de-coupled into different criteria¹⁵⁴ that, together with other strategies, constitute the means (as against the process) by which risk can be managed in projects.

Gillette and Krier¹⁵⁵ also find that risk management is a four-step process, consisting of: delineating the parameters of the exposure; determining the potential adverse consequences;

¹⁵¹ Valipour, A., Mohammadi, F., Yahaya, N., Sarvari, H. and Noor, N. M. (2014) 'Identification and Evaluation of Risk Allocation Criteria and Barriers: A Malaysian Public Private Partnership Project Case Study', *Journal of Applied Sciences*, 14(18), at p. 2023.

¹⁵² *Ibid*, at p. 2023.

¹⁵³ *Ibid*, at p. 2024.

¹⁵⁴ They find that 'Bear the risk at the lowest price', 'Control the chance of risk', and 'Risk attitude' are three major optimal risk allocation criteria.

¹⁵⁵ *Op.Cit*, at p. 1062.

defining the correlation between the exposure and the consequences; and estimating total risk involved. They opine that the smooth running of this process is predicated on availability of dependable information and the exercise of good judgment in discerning boundaries of the inquiry.

Woodcock¹⁵⁶ takes a different approach in a two-step process, and categorises the risk management process into *risk auditing* and *risk reduction*. The former entails the investigation of the potential exposure that the organisation or business has, while the latter proposes remedial steps that could be undertaken to lower the exposure. He also makes reference to establishment of a *risk profile*, which is essentially the aggregation of the risk exposure, correlated with the frequency of occurrence and the severity of impact if it does.¹⁵⁷

A connection can be made between all the differing approaches. All the steps inevitably seek to understand the correlation between events and risks inherent in an organisation, and recognise the need for strategies in mitigation. Therefore, the risk management steps are a necessary precursor to the risk management strategies, the latter being the actual courses of action that need to be undertaken, or the tools that need to be utilised to ensure that a given event does not occur, the chances of its occurrence are reduced, or its impact is minimal if it inevitably does.

1.4.3 Risk Aversion

As far as risk management strategies are concerned, March and Shapira¹⁵⁸ have stated that human beings tend to be naturally risk averse,¹⁵⁹ and that decision makers tend to prefer low-risk

¹⁵⁶ Woodcock, J. (1992), 'Risk Auditing and Risk Reduction' in *Managing Risks of Investments in Developing Countries*; *Op.Cit.*, at p. 14.

¹⁵⁷ *Ibid.*, at p. 14.

¹⁵⁸ March, J. G. and Shapira, Z. (1987) 'Managerial Perspectives on Risk and Risk Taking', *Management Science*, 33(11), at pp. 1404–1418.

¹⁵⁹ Expressed as meaning 'When faced with one alternative having a given outcome with certainty, and a second alternative which is a gamble but has the same expected value as the first, an individual will choose the certain outcome rather than the gamble', *Ibid.*, at p. 1405.

transactions, even though they are able to make sacrifices that have a positive effect on possible outcomes.¹⁶⁰ Cooper and John¹⁶¹ agree that people would typically avoid risk as much as possible, and draw a distinction between *risk aversion* and *risk-neutrality*¹⁶². They draw a parallel between risk aversion and an outright *gamble*, and people who are risk averse would typically agree to part with some value if they believe that it would safeguard them from an even greater risk of loss if the undesirable event occurs. To them, this is a preferred option to a *gamble*, which portends greater losses if the risk event occurs. Risk-neutral individuals are neither risk averse nor averse to a *gamble*.¹⁶³

One way of managing risk is by diversifying or sharing one's risk, which is the principle upon which insurance is based. The concept of pooling of risks, known as *diversification*, ensures that the full incidence of a risk is not borne by a party upon the occurrence of an undesirable event. Insurance, as a risk management strategy, is more fully discussed below.

Risk aversion is not a static phenomenon. Danielsson *et al*¹⁶⁴ suggest that market players respond to changing market conditions by embracing or avoiding risk. They are quick to clarify that this is not necessarily a reflection of risk appetite, as risk aversion can increase even though risk appetite remains the same.¹⁶⁵

1.4.4 Risk Allocation

When one contract party is either unwilling or unable to bear all the risks associated with a given transaction, parties are wont to negotiate modalities for bearing the economic consequences of

¹⁶⁰ *Ibid*, at p. 1406.

¹⁶¹ Cooper, R. and John, A. A. (2012). *Theory and Applications of Economics* (v. 1.0). Available at: <http://2012books.lardbucket.org/pdfs/theory-and-applications-of-economics.pdf>. Accessed on 10 March 2016.

¹⁶² *Ibid*, at p. 162.

¹⁶³ *Ibid*, at p. 162.

¹⁶⁴ Danielsson, J., Shin, H. S., Zigrand, J.-P. and Equity, A. (2010) *Risk Appetite and Endogenous Risk*. Financial Markets Group.

¹⁶⁵ *Ibid*, at p. 3.

the occurrence of adverse events. This is *risk allocation*, and the difference between this concept and *diversification* (which is also a form of risk sharing), which was discussed above, is the fact that the latter relies on the insurance structure in which risk is pooled, with several people participating, while the former occurs only as between parties in a commercial arrangement. It is worth stating at this time that risk allocation may be done by parties themselves, but could also happen by judicial or legislative intervention, or indeed by operation of law.

Risk allocation can occur due to several reasons. Cibinic *et al*¹⁶⁶ have stated that this could be caused when contract cost is increased, or other factors that alter the conditions of contract, and make performance onerous and/or impossible if not addressed and redressed.¹⁶⁷ Cole,¹⁶⁸ in similar terms, suggests that misleading or inaccurate information provided by the client (in this case, the government) should suffice to trigger risk allocation discussions.¹⁶⁹

Loosemore and McCarthy have stated that risk allocation must be viewed within a particular socio-behavioural context if it is to hold any meaning.¹⁷⁰ From this view, risk allocation is not homogenous, but could apply differently in different circumstances, and the rationale for any risk allocation would also be circumstance dependent. Even though they disclaim a uniform rationale for risk allocation, they also advise that risk should be allocated to the party with capacity¹⁷¹ to take it,¹⁷² and who should also be fully apprised of the risks being allocated.¹⁷³

¹⁶⁶ Cibinic, J., Nash, R. C. and Nagle, J. F. (2006) *Administration of Government Contracts*. Washington, DC; Chicago, IL: George Washington University, National Law Center, Government Contracts Program; Wolters Kluwer/CCH.

¹⁶⁷ *Ibid*, at p. 245

¹⁶⁸ Cole, Brian M. (1970). 'Misrepresentation in Public Contracts: Allocating the Risk of Loss' 21 *Syracuse L. Rev.* 1004.

¹⁶⁹ *Ibid*, at p. 1005.

¹⁷⁰ Loosemore, M. and McCarthy, C. (2008), *supra*, at p. 95.

¹⁷¹ In terms of resources with which to ride out the risk, if the event occurs. This would include the right level of expertise and authority, and the wherewithal to implement other risk management strategies that ensure that contract objectives are met.

¹⁷² See Diamond, P. A. (1974) '*Posner's Economic Analysis of Law*'; *supra*, at p. 298.

¹⁷³ *Ibid*, at p. 95.

In order to ensure that they meet their allocated share of the economic consequences should the event occur, parties are sometimes contractually mandated to maintain insurance.¹⁷⁴ Insurance as a risk management strategy is more fully discussed below, but suffice it to say that this is required to support the risk-bearer in discharging the financial obligation (economic consequences) of the occurrence of the event contemplated by the contract.

The issue then turns on the consequences (on risk allocation) of not taking out insurance even when this is mandated by contract. As Thornsjo points out, there is no guarantee that the indemnitor would actually obtain the requisite insurance just because there is a contractual requirement for this¹⁷⁵. This study posits that the indemnitor would be in breach of contract for not obtaining and maintaining the requisite insurance, and remains obliged to the indemnitee in respect of the indemnities which were supposed to be covered by insurance. Although the indemnitee remains liable for the *legal* consequences of the occurrence of the event giving rise to the liability, it is doubtful that the indemnitor is able to pursue a claim against the indemnitee to recover any losses, as he (the indemnitor) is responsible for the *economic* consequences of the occurrence of the event. The indemnity structure allocates the risk to the indemnitor, preventing him from recovering against the indemnitee in this situation, and *ipso facto* confers on the indemnitee the right to pursue a claim in breach of contract against the indemnitor for failing to take out insurance as contractually required. Furthermore, it is also arguable that the principle of *estoppel* may bar any action by the indemnitor even in the face of loss purportedly suffered by him as a result of the occurrence of the event.¹⁷⁶

¹⁷⁴ See, for instance, *Scottish Special Housing Association v Wimpey Construction (UK) Ltd* (1986) 31 BLR 17 at p. 29; Thornsjo, D. O. and Hasan, N. B. (2007), *supra*, at p. 18.

¹⁷⁵ Thornsjo, D. O. and Hasan, N. B. (2007), *supra*, at p. 21.

¹⁷⁶ The argument could be made that the principle of *contractual estoppel* would prevent the indemnitor from recovering any costs from the indemnitee. In *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 at para 56, it was held, *inter alia*, that 'There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not ... Where parties express an agreement of that kind in a contractual document, neither can subsequently

1.4.5 Risk Acceptance

A party can also choose to *accept* the risk allocation outcome, even if he thinks it is sub-optimal, and especially if the balance of power is against him. In the literature considered earlier, there were approaches to risk that highlighted the upside of this concept. Since risk can be beneficial in certain circumstances from this perspective, it follows that accepting it would be a strategy that is sometimes pursued to enable the party to reap its potential benefits.

Carlsson¹⁷⁷ agrees, and asserts that risk acceptance is necessary as a risk management strategy, as it enables parties to focus on risks that are not accepted so they can plan accordingly. He, however, admonishes that accepting *all* risks is not a good idea and is certainly not a good risk management strategy.¹⁷⁸

Rammerstorger¹⁷⁹ finds a correlation between risk acceptance and profits. She posits that companies will accept higher risk as long as this translates into higher profits which surpass the cost of capital attendant upon the increased risk.¹⁸⁰ Loosemore and McCarthy state that the party that accepts this increased risk should be entitled to charge a premium in consequence of this.¹⁸¹ This position supports the correlation between *risk* and *reward* – a relationship that is the subject of vast literature¹⁸².

deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel ...’.

¹⁷⁷ Carlsson, O., ‘To Accept, or Not to Accept: Things to Consider When Building a Risk Acceptance Strategy’ (The Vulnerability Management Blog, 20 February 2014), <http://blog.outpost24.com/2014/02/20/risk-acceptance/> accessed 11 March 2016.

¹⁷⁸ *Ibid*, at <http://blog.outpost24.com/2014/02/20/risk-acceptance/>

¹⁷⁹ Rammerstorger, M. (2009) ‘Risk Acceptance and Regulatory Risk’, *Competition & Reg. Network Indus.*, 10, p. 235.

¹⁸⁰ *Ibid*, at p. 254.

¹⁸¹ *Op.Cit*, at p. 95.

¹⁸² See for example, Burke, M., Nicholas P., (2010) *Risk versus Reward Capital Markets: Indonesia Dispute Resolution*. 29 Int'l Fin. L. Rev. 25 2010–2011, p. 25; Millage, A. (2007) ‘Risk and Reward’, *The Internal Auditor*, 64(5), p. 6; Albion, M. S. (2008) *More Than Money: Questions Every MBA Needs to Answer: Redefining Risk and Reward for a Life of Purpose*. San Francisco: Berrett-Koehler Publishers; Quartz, S. R. (2009) ‘Reason, Emotion and Decision-Making: Risk and Reward Computation with Feeling’, *Trends in Cognitive Sciences*, 13(5), at pp. 209–215.

There is no doubt that a relationship exists between risk and reward, even though this could be positive, negative or neutral. Parties would prefer a positive relationship, but this is not always the case. To hedge against the impact and implications of a negative relationship, parties may resort to insurance, which would serve as a buffer upon the occurrence of the event, as it would help in coping with the economic consequences of that occurrence.¹⁸³

The European Union (EU) Agency for Network and Information Security (ENISA)¹⁸⁴ has advised that *risk acceptance* does not remain static, but could change, even as new conditions emerge.¹⁸⁵ This may be generally true but, within a contractual arrangement, parties are bound by the terms of their contract and any changes must be in accordance with their agreement, each emergent condition being the subject of negotiation before implementation.

1.4.6 Risk Transfer

Closely related to the strategy of *risk allocation*, is the strategy of *risk transfer*. CNA Risk Control views this as the risk management strategy that entails the shifting of risk, in its entirety, by one contractual party to another.¹⁸⁶ According to them, this is the strategy that underpins an insurance contract (wherein the insured transfers his risk to the insurance company), as well as the basis for a party's assumption of the financial liability of another party, pursuant to indemnity provisions in a contract.

¹⁸³ See, generally, Posner (1986), *Op.Cit.* at p. 92 for a discussion on insurance, risk shifting and the function of contracts in this regard.

¹⁸⁴ ENISA is an agency of the EU.

¹⁸⁵ 'Risk Management' <https://www.enisa.europa.eu/activities/risk-management/current-risk/risk-management-inventory/rm-process/risk-acceptance>, accessed on 11 March 2016.

¹⁸⁶ CNA (2006) 'Risk Transfer: A Strategy to Help Protect Your Business', Available: CNA Risk Control. Available at: https://www.cna.com/web/wcm/connect/b7bacbf0-b432-4e0c-97face8730b329d5/RC_Guide_RiskTransferStrategytoHelpProtectYou+Business_CNA.pdf?MOD=AJPERES; accessed 12 March 2016.

Lam¹⁸⁷ defines risk transfer as the ‘deliberate exchange of probabilistically different cash flows’ – essentially, the process by which risk is moved from one entity to the other. He opines that this transfer is not necessarily between two independent entities, but can also occur between two parts of the same entity.¹⁸⁸ He confirms the role of insurance in this transfer process, as well as the fact that derivative products¹⁸⁹ could be the medium of the exchange. Indeed, Koopmans elevates the status of risk transfer as being the vehicle through which economic risk is reduced, holding that this is the very motivation for contractual parties.¹⁹⁰

1.4.7 Risk Mitigation

When risk has been accepted, the accepting party still needs to institute measures that ensure that the event does not occur, reduces the chance that it will occur or, if it does, that the impact is not as serious as it could possibly be. This is known as *risk mitigation*, and has been defined as the ‘process of developing options and actions to enhance opportunities and reduce threats to project objectives’.¹⁹¹ MITRE also identifies ‘options’ in risk mitigation – shorthand for several alternatives that can be utilised to reduce the probability that a risk event will occur, and/or the harshness of its consequences if it does.¹⁹² Instructively, they list the following measures: *risk assumption/acceptance, avoidance, control, transfer, watch/monitoring*.

¹⁸⁷ Lam, J. (2014) *Enterprise Risk Management [Electronic Resource]: From Incentives to Controls*. Wiley Finance: Wiley.

¹⁸⁸ *Ibid*, at p. 111.

¹⁸⁹ *Futures, swaps, options, and forwards; Ibid*, at p. 111.

¹⁹⁰ Koopmans, T. C., (1957), ‘Three Essays on the State of Economic Science’, 162-63 (1957), cited in Gillette, C. P. (1990) ‘Commercial Relationships and the Selection of Default Rules for Remote Risks’, *Journal of Legal Studies*, 19(2), pp. 535–581, at p. 538.

¹⁹¹ MITRE (2013) *Risk Mitigation Planning, Implementation, and Progress Monitoring*. Systems Engineering Guide. USA: The MITRE Corporation. Available at: <http://www.mitre.org/publications/systems-engineering-guide/acquisition-systems-engineering/risk-management/risk-mitigation-planning-implementation-and-progress-monitoring>; accessed 13 March 2016.

¹⁹² *Ibid*, at <https://www.mitre.org/publications/systems-engineering-guide/acquisition-systems-engineering/risk-management/risk-mitigation-planning-implementation-and-progress-monitoring>

The Committee for Oversight and Assessment¹⁹³ defines *risk mitigation* as reduction of the possibility that a risk event will occur and/or reduction of the consequences if it occurs,¹⁹⁴ while Herrera¹⁹⁵ sees it as steps to limit adverse consequences. Herrera also lists strategies in risk mitigation as being ‘risk acceptance’, ‘avoidance’, ‘limitation’ and ‘transference’.

Chopra *et al*¹⁹⁶ have stated that, in implementing risk mitigation strategies, a common understanding of risks must exist, and then the preferred strategy tailored to the peculiar circumstances of the organisation or other endeavour.¹⁹⁷ They also advocate a robust implementation of the strategies, including ‘insurance’ as a part of this mix, and this is discussed below.

1.4.8 Insurance as a Risk Management Strategy

As previously noted, insurance is crucial as a risk management strategy. Indeed, Ewald proclaims that the entire notion of insurance is hinged on risk, and goes on to define it as ‘the application of probability calculus to statistics’.¹⁹⁸ van der Merwe¹⁹⁹ approaches insurance as a contract in which one party (insurer), in return for monies paid, will, upon the occurrence of a specific event, recompense the other party (insured) in a manner that seeks to restore the latter to the *status quo ante*. It works on the principle of pooling of risks by a collectivity of people who are exposed to the same specific risk,²⁰⁰ each of whom is willing to make a payment

¹⁹³ Committee for Oversight and Assessment of U.S. Department of Energy Project Management, National Research Council (2005) *The Owner’s Role in Project Risk Management*. USA: National Academies Press.

¹⁹⁴ *Ibid*, at p. 51.

¹⁹⁵ Herrera, M. (2013) ‘Four Types of Risk Mitigation and BCM Governance, Risk and Compliance (GRC)’ *MHA Consulting*. Available at: <http://www.mha-it.com/2013/05/four-types-of-risk-mitigation/> [2016].

¹⁹⁶ Chopra, S. and Sodhi, M. S. (2004) ‘Managing Risk To Avoid Supply-Chain Breakdown’, *MIT Sloan Management Review*, 46(1), at pp. 53–62.

¹⁹⁷ *Ibid*, at p. 59.

¹⁹⁸ *Op.Cit*, at p. 200.

¹⁹⁹ van der Merwe, S. (1970) ‘The Concept of Insurance and the Insurance Contract’, *The Comparative and International Law Journal of Southern Africa*, at pp. 149–167.

²⁰⁰ van der Merwe calls this a ‘community of exposed persons’.

(premium) to avoid bearing the incidence of the economic consequences of an event if and when it occurs. The insurer arrives at this premium by estimating the frequency of the risk events, and applying this outcome to a ‘calculus of probabilities’,²⁰¹ in order to predict the chance of the risk materialising.

Insurance can be voluntarily undertaken by an entity, arise pursuant to a contractual obligation, or be mandated by legislation. Given the focus of this study on contractual risk allocation, a more detailed discourse on the role of insurance in risk allocation will be undertaken in the course of this study. Suffice it to state here that the contractual obligation to take out insurance is usually pursuant to indemnity provisions that offer protection to parties. Thus, where a party (indemnitor) undertakes to indemnify another party (indemnitee) for any loss suffered upon the happening of a specified event, the indemnitor is actually saying that he (the indemnitor) will bear the economic consequences of the occurrence of that event. However, to make good this promise, the indemnitor needs to have the financial capacity to bear this economic burden if and when the event occurs. This is one reason why the indemnitor is sometimes contractually required to take out insurance that ensures that the indemnitee will actually get the benefit of the indemnity clause, as the insurers will step in to effectuate the clause. This is consistent with the advice by Thornsjo and Hasan²⁰² that indemnification protections are only ‘as good as the indemnitor’s balance sheet’;²⁰³ thus, insurance comes in to either supplement the balance sheet or assume the liability to give effect to the indemnity clause in its entirety.

To give efficacy to the insurance requirement arising from the contractual indemnity obligations, the contract would usually state that the insured be regarded as an ‘additional insured’, and an

²⁰¹ Ewald (1991), *supra*, at pp. 201–202.

²⁰² Thornsjo, D. O. and Hasan, N. B. (2007) ‘Contractual Risk Management: Considerations When Allocating Third-Party Liability Risk’, at pp. 1–68, <http://www.olwklaw.com/>, Johnson & Condon, P.A. Available at: <http://www.olwklaw.com/docs/07-01-16%20MDLA%20Seminar%20Risk%20Management%20Materials.pdf>; accessed 14 March 2016.

²⁰³ *Ibid*, at p. 18.

endorsement made on the policy holder (indemnitor's) insurance policy in this regard. Anderson²⁰⁴ states that an additional insured is usually a business partner to a policy holder, and their business relationship makes it sensible to endorse that individual onto the policy holder's insurance policy. He opines that this is usually done to ensure that the indemnity obligation is duly funded, as well as to procure a waiver of the right of subrogation in respect of the policy holder's insurer.²⁰⁵

Crucial to the notion of insurance is the concept of *insurable interest*. In some jurisdictions, there is a legal requirement to prove that the loss of the utility of something would expose that individual to hardship that can be expressed in financial terms.²⁰⁶ Consequently, that individual has an incentive in preserving the existence of that thing, or at least the utility to be derived from the use of that thing, to the extent of taking out insurance to guarantee this objective.

In the United Kingdom, there is a statutory requirement to establish an insurable interest, without which the contract for insurance would be void. Thus, the Marine Insurance Act 1906,²⁰⁷ which codifies three earlier statutes,²⁰⁸ provides the legal basis for this concept in English and Scottish law. Reinecke,²⁰⁹ in a recent treatise on a case in South Africa,²¹⁰ finds that there are two key principles to be established in cases involving insurable interest, essentially whether the insured has an interest that merits protection, and the quantification of that interest in monetary terms in the event of loss.²¹¹

²⁰⁴ Anderson, R. (2008) ““Certificates of Insurance” and “Additional Insured” Coverage - Maximize Value and Avoid Pitfalls”, *The John Liner Review*, 22(2), at pp. 87–91.

²⁰⁵ *Ibid*, at p. 88.

²⁰⁶ For instance, in the United Kingdom, per the Marine Assurance Act 1906, *infra*.

²⁰⁷ (8 Edw. 7 c.41). Section 4 voids a policy without insurable interest. See, generally, Chalmers, M. D. E. S. and Owen, D. (1907) *The Marine Insurance Act, 1906*. London: W. Clowes.

²⁰⁸ Life Assurance Act 1774 (14 Geo. 3 c.48); Marine Insurance Act 1746; and Marine Insurance Act 1778.

²⁰⁹ Reinecke, M. F. B. (2013) *Insurable Interest*, Regspraak. p. 816.

²¹⁰ *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Co South Africa Ltd (54/08)* (2013) ZAWCHC 64; 2013 (5) SA 42 (WCC); [2013] 4 All SA 71 (WCC) (29 April 2013). Also, online at <http://www.saflii.org/za/cases/ZAWCHC/2013/64.html>

²¹¹ Reinecke, M. F. B. (2013), *supra*, at p. 817.

In offshore drilling contracts where insurance is contractually required, the requirement for insurable interest is satisfied by the parties. The indemnitor who is the primary policy holder has an interest in the subject matter by virtue of the financial loss that he would incur if the *res* of the contract is damaged or destroyed, or if the contract activities cause damage or destruction, while the indemnitee's interest arises pursuant to the indemnity given by the indemnitor.

If insurance is required, the obligor party can request the other party (beneficiary) to confirm whether self-insurance is acceptable. This happens when the obligor has the financial capacity to give efficacy to the indemnity clause, either because he has created a fund for this purpose, or has other insurance arrangements, which may not necessarily be insurance available in the open market. If financially capable, they can choose to cover all their risks, or they can cover this *pro tanto*, sourcing market insurance for the remainder of the risk portfolio. However, this is all subject to the other party (usually the indemnitee for the specific risk/liability sought to be covered by the insurance) accepting the self-insurance measures in place to cover for the subject risk.

A few conclusions can be drawn from the discussion on risk strategies so far. First, a common denominator for the strategies is the requirement for insurance as the basis for ensuring efficacy of the plans for managing risk. The indemnity provisions as well as other risk allocation provisions need to be backed by funding, either by open-market insurance or the self-insurance mechanism of the relevant party.

Secondly, strategies are not static. Parties in a commercial arrangement typically utilise different strategies in line with the risks and/or exigencies being addressed.

Thirdly, strategies straddle each other. For instance, *risk allocation* is in effect *risk transfer* even though allocation suggests that it is not only one party that takes all the risk, but connotes a sort of risk-sharing between the parties *inter se*.

Fourthly, strategy is fact- and circumstance-dependent. The strategy adopted would depend on the specificities of the parties' contractual situation.

Fifthly, none of the strategies talks about *eliminating* risk in its entirety. Indeed, the notion of 'management' is coterminous with the fact that the existence and prevalence of risk are ever-present dimensions of humanity.

1.5 Risk Allocation in Offshore Drilling Contracts – Current State

1.5.1 Methods of Risk Allocation

The method and parameters for allocating risk in contracts, and offshore drilling contracts in particular, have always been at the heart of negotiations between the parties. Coates has observed that most of the provisions of contracts allocate risk. However, certain provisions are designed to do this in a deliberate manner, and aim to achieve certain objectives.²¹² Gordon²¹³ organises these provisions into three broad groups: *indemnities*, *exclusions/exemptions* and *limitation of liability*.

These groups (methods) are more fully discussed in subsequent parts of this study. However, suffice it to say that indemnities represent an obligation of compensation for, or protection against, consequences of loss occurrence;²¹⁴ exclusions operate to preclude the right of action or recovery by a party,²¹⁵ and limitations of liability limits a party's financial exposure in the event

²¹² Coates, J. C. IV (2012) 'Allocating Risk through Contract: Evidence from M&A and Policy Implications', Available at SSRN 2133343.

²¹³ Gordon, G. (2011) 'Risk Allocation in Oil and Gas Contracts (Chapter 14)', in Gordon, G., Paterson, J. and Usenmez, E. (eds) *Oil and gas law: current practice and emerging trends*. Dundee: Dundee University Press, at pp. 443–497.

²¹⁴ See *Lafrentz v M&L Leasing* (2000) ABQB 714, (CanLII), <<http://canlii.ca/t/5mvk>>, accessed 13 June 2016.

²¹⁵ See *Farstad Supply AS v Enviroco Limited and Asco UK Ltd* [2010] UKSC 18.

that certain heads of loss occur.²¹⁶ Many writers in this area of law seem to agree with this categorisation.²¹⁷

The use of indemnities has not been without controversy, as some jurisdictions have enacted legislation that prohibits their enforcement in circumstances in which public policy concerns may be impacted. In the UK, the Unfair Contracts Terms Act 1977 establishes an anti-indemnity regime by prohibiting the limitation or exclusion of liability for death or personal injury arising from negligence,²¹⁸ and subjects a limitation or exemption clause for any other type of loss/damage arising from negligence to the reasonableness test.²¹⁹

With respect to the USA in which four states²²⁰ have enacted anti-indemnity statutes,²²¹ Anderson²²² posits that these statutes preclude indemnification against death, injury or damage, if it was caused by the indemnitee's negligence; they expressly nullify and void any provision in any agreement which purports to circumvent and/or defeat the prohibitive aim of the legislation.²²³ Redfearn²²⁴ has pointed out the difference in approach between the Louisiana statute and the other anti-indemnity statutes, as far as sole or contributory negligence is concerned. Thus, while the anti-indemnity statutes of the other states will not preclude a party

²¹⁶ Gordon, G. (2011), *supra*, at p. 496.

²¹⁷ See, for instance, Moomjian, C. A. Jnr. (1999) 'Contractual Insurance and Risk Allocation in the Offshore Drilling Industry', *Drilling Contractor*, January/February; Katz, Gerald. I., 'Contract Risk Allocation', Contractual Risk Transfer Seminar; Anderson, O. L. (1989), 'The Anatomy of an Oil and Gas Drilling Contract', *Tulsa LJ*, 25, p. 359.

²¹⁸ Section 2(1).

²¹⁹ Section 2(2) and (3).

²²⁰ Texas, Louisiana, Wyoming and New Mexico.

²²¹ The Wyoming Act (Wyo. STAT. §§ 30-1-131 to -133 (1983); the New Mexico Act (N.M. STAT. ANN. § 56-7-2 (1986); the Louisiana Act (LA. Rnv. STAT. ANN. § 9:2780 (West Supp. 1989); the Texas Act (TEX. CIV. PRAC. & REM. CODE §§127.001 – 127.007).

²²² Anderson, O. L. (1989), *supra*.

²²³ See, for instance, the Louisiana Oilfield Anti-Indemnity Act ('LOAIA'), La. Rev. Stat. 9:2780(g).

²²⁴ Redfearn R. J., (2005) 'Oilfield Anti-Indemnity Acts and Their Impact on Insurance Coverage: A Comparative Analysis', *Insurance Journal West Magazine* (August 22, 2005), Wellsmedia Group. Available at: <http://www.insurancejournal.com/magazines/features/2005/08/22/59608.htm>; accessed 23 May 2016.

from being indemnified in respect of the other party's contributory negligence, the Louisiana statute prohibits any sort of recovery in this instance.²²⁵

The perspectives of the parties to the drilling contract differ in respect of these risk allocation methods. Foster *et al*²²⁶ conducted research into the similarities and differences in the way in which risk was allocated in some drilling contracts (land and offshore),²²⁷ and presented their findings on the profile of risks usually allocated between both parties. They found a lot of variations in the way in which this was done in respect of different heads of risk in the different contracts,²²⁸ and, among other recommendations, suggest that improved clarity of contract language as well as better collaboration between the parties as ways of ensuring the efficacy of the risk allocation strategies in drilling contracts.²²⁹

1.5.2 Parameters of Risk Allocation

Given the necessity to co-operate, different parameters for determining the optimum risk allocation formula have been proposed. Triantis²³⁰ states that *foreseeability* is a factor that determines risk allocation patterns in contracts. He draws this conclusion from the rule in *Hadley v Baxendale*²³¹ that a promisor can be relieved from the consequences of his breach if the promisee's losses were unforeseeable.

Triantis makes the link between risk allocation, foreseeability and *efficiency*, stating that the manner in which risk is allocated creates incentives for parties to invest in mitigation and

²²⁵ *Ibid*, at p. 1.

²²⁶ Foster, Stephen J., *et al* (2003), *supra*, at p. 2.

²²⁷ Fifteen (15) contracts from North and South America, Middle East, Asia and Pacific. These include standard forms created by IADC and CAODC/CAPP.

²²⁸ *Ibid*, at p. 6. For instance, in respect of removal of debris after a blow-out incident, while some contracts list this as the operator's responsibility as part of well control requirement, others allocate this to the contractor as owner of the equipment.

²²⁹ *Ibid*, at p. 12.

²³⁰ Triantis, G. G. (2000), 'Unforeseen Contingencies. Risk Allocation in Contracts', *Encyclopedia of Law and Economics*, 3, at pp. 100–116.

²³¹ Ex. 341, 156 Eng. Rep. 145 (1854).

avoidance measures that address the risk event, the level of which is determined by their risk appetite.²³² Posner, however, cautions that *foreseeability* alone is not enough incentive to allocate a risk at the time of drafting the contract, proffering that *likelihood of occurrence* should also be high.²³³ He also approaches this subject from a cost and efficiency perspective, as he posits that it would be more cost effective for the courts to ‘draft’ in the contractual term, in effect allocating the risk, only if and when the event occurs²³⁴.

Another parameter that can be seen through the literature is the so-called doctrine of *tradition* which essentially means that risk allocation should follow usual industry practice. The problem with this doctrine is that there is no general acceptance as to what ‘industry practice’ is, as this varies from jurisdiction to jurisdiction and could also change, depending on factors such as market forces and balance of power between the parties. For instance, Hewitt²³⁵ lists several heads of liability (risks) in a drilling contract,²³⁶ and then purports to allocate them traditionally between company (operator) and contractor. However, he immediately enters the caveat that this is subject to the drafting of individual contracts.²³⁷

Moomjian also refers to ‘customary’ risk-sharing formula pursuant to which he asserts that the contractor is responsible for death or injury to their personnel, as well as loss/damage to their rig and/or equipment.²³⁸

²³² *Ibid*, at p. 101.

²³³ Posner, R. A. (1986), *supra* at p. 82.

²³⁴ *Ibid*, at p. 82.

²³⁵ Hewitt, T. (2008) ‘Who is to Blame? Allocating Liability in Upstream Project Contracts’, *Journal of Energy & Natural Resources Law*, 26(2), pp. 177–206, at p. 181.

²³⁶ He lists the following heads of risk: (a) pollution emanating from the reservoir, the use of oil-based drilling muds or similar materials, the discharge or storage of contaminated, cuttings or from the use or disposal of radioactive sources; (b) loss of or damage to property, materials or equipment while ‘downhole’; (c) loss of or damage to any well or hole; (d) blowout, fire, explosion, cratering or any uncontrolled well condition (including costs to control a wild well and the removal of debris); (e) damage to the reservoir or geological formation; and (f) wreck removal. He then allocates (a) to (e) traditionally to the company (operator), and (f) to the contractor.

²³⁷ *Ibid*, at p. 181.

²³⁸ Moomjian, C. A. (1999), *supra* at p. 20.

1.5.3 *Negligence/Wilful Misconduct in Risk Allocation*

There are factors that could cause the responsibility for economic consequences of the occurrence of an event to shift from one party to another. For instance, where one party is better positioned to bear a specific risk, the responsibility for the economic consequences of that risk eventuating could shift to him.²³⁹ Likewise, when the potential cost of the occurrence of an event is too high for a party, this is a great incentive to seek to shift the economic burden to another party.²⁴⁰ Most times, these factors influence the manner in which risk is allocated *prior* to the occurrence of the event, and so parties can factor the risk allocation into their planning and risk profile.

The point must be emphasised that this ‘shifting’ of the economic burden is only as between the contract parties themselves. From a third-party perspective, the responsibility for the economic consequences of a wrongful act that has caused him harm or loss remains with the wrongdoer. In this context, legal liability equates to financial liability, and the third party is not concerned with whatever internal arrangements the wrongful party has made with another contract party to assume primary financial responsibility for the consequences of the occurrence that caused him harm or to indemnify him (the wrongful party) accordingly.

From the literature, perhaps the most controversial attempts to shift the economic consequences of the occurrence of a specified risk event happens *after* the event has occurred, and this arises pursuant to a finding of negligence and/or wilful misconduct. In *Blyth v Birmingham Waterworks Co*, negligence was defined as the failure to do something that a reasonable man would do, or conversely, doing something a reasonable man would refrain from doing, taking

²³⁹ See Valipour *et al*, *supra*, at p. 2024.

²⁴⁰ See, for instance, Triantis, G. G. (2000), *supra*, at p. 101.

into consideration the normal conduct of human affairs.²⁴¹ The concept of ‘reasonable man’ is one which has been written on by several commentators²⁴², and represents the attempt to determine objectively whether a party has been negligent, given a set of facts and circumstances.

Under American jurisprudence, negligence has been graduated into different degrees, depending on the level of reasonable care required, which must be proportionate to the potential risk.²⁴³ Consequently, a party’s conduct can be categorised as *slight* negligence, *ordinary* negligence or *gross* negligence²⁴⁴. This categorisation has been problematic at both theoretical²⁴⁵ and practical levels. Commenting on the court’s approach to the conduct of BP Exploration & Production, Inc (BP) in the Macondo oil spill law suit, LeCesne²⁴⁶ points out the extreme challenge that the court will face in trying to categorise BP’s conduct, given the factual and technical complexities surrounding the case.²⁴⁷ This difficulty is real despite the fact that liability may actually be dependent on whether negligence is ‘gross’, as this would have the effect of allocating (or re-allocating) risk from one party to another.²⁴⁸

Unlike the US system, English law does not generally categorise negligence into different degrees in line with perceived seriousness of the infraction. Although there have been debates as

²⁴¹ (1856) 11 Ex 781, per Alderson, B.

²⁴² See, for instance, LawTeacher, ‘Negligence Breach Lecture’. [online] (November 2013); LawTeacher, the Law Essay Professionals. Available at: <http://www.lawteacher.net/lecture-notes/tort-law/negligence-breach-lecture.php?cref=1>; accessed 25 May 2016.

²⁴³ Prosser, W. L. and Keeton, P. (1984) Prosser and Keeton on Torts. West Publishing, at p. 208.

²⁴⁴ *Ibid*, at p. 210, citing *New York Central Railroad Co v Lockwood*, 1873, 84. U.S. (17 Wall.)357, 21 L.Ed. 627. Slight negligence (if a party fails to take ‘slight’ care); ordinary negligence (if a party fails to take ‘ordinary’ care); and gross negligence (if a party fails to take ‘great’ care).

²⁴⁵ The categorisation has been described as vague and lacking practicality, creating difficulty and confusion: Heuston, Salmond on Torts, 16th ed. 1973, at p. 224, cited in Prosser, W. L. and Keeton, P., *supra*, at p. 210.

²⁴⁶ LeCesne, B. (2011) ‘Crude Decisions: Re-Examining Degrees of Negligence in the Context of the BP Oil Spill’, 2012 Michigan State Law Review 103, Loyola University New Orleans College of Law (Research Paper No. 2012-16); Available at SSRN: <http://ssrn.com/abstract=1941864>.

²⁴⁷ *Ibid*, at p. 105

²⁴⁸ See, for instance, the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762 (2006), whose provisions are of the effect that gross or contributory negligence could negate the ability of an injured party to recover from the other party.

to whether it should,²⁴⁹ the current state of the law is that the distinction between negligence and *gross negligence* is ‘sterile and semantic’²⁵⁰ (emphasis added).

Wilful misconduct also has the effect of risk allocation (or re-allocation) when it is established to have occurred. In *Forder v Great Western Railway Co*, this term is contrasted from *accidents* and *negligence*, and held to be intentional wrong-doing by a party who knowingly does it, and persists in doing this without any thought or care as to consequences.²⁵¹ In some offshore drilling contracts, where wilful misconduct is established, it could make the operator vicariously liable for the acts of its senior supervisory personnel²⁵². The principles of negligence and wilful misconduct and the impact on risk allocation are further discussed in this study.²⁵³

Conclusion

Every action or omission has consequences. These consequences may have a positive, negative or neutral effect upon a party. Different writers have conceptualised this phenomenon as ‘risk’, and have approached it in diverse ways. This study takes the position that ‘risk’ can be truly understood only when it is contextualised; being capable of different meanings, sometimes even within the same context, clarity is obtained in specific situations, in which the so-called risk event has been pitted against other surrounding events and circumstances.

In this section of the study, the definitional challenge of the concept has also been highlighted, and approaches emphasising the upside and downside of risk presented and discussed. Better

²⁴⁹ See, for instance, *Tradigrain SA v Internek Testing Services*, [2007] EWCA Civ 154 at para 23, Moore-Bick LJ observed that ‘The term “gross negligence”, although often found in commercial documents, has never been accepted by English civil law as a concept distinct from civil negligence ...’. In *Camarata Property v Credit Suisse Securities* [2011] EWHC 479, Mr Justice Andrew Smith accepted that the distinction between the terms is one of degree and not of kind. However, Deakin *et al* have questioned the lack of distinction between the two concepts, especially where a defendant’s conduct is ‘not just bad, but repeatedly bad’: Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin's Tort Law*. Oxford University Press, at p. 27.

²⁵⁰ Per Lord Justice Aikens in *Springwell v JP Morgan* [2010] EWCA Civ 1221 at para 193.

²⁵¹ (1905) 2 KB 532, at 535–536.

²⁵² See, for instance, Art. 4.6, AIPN Model International Operating Agreement 2002.

²⁵³ Chapter 7 – *Comparative Analysis of the Model Contracts*.

understanding of risk has also been established by contrasting it from other similar but different concepts, which are sometimes used interchangeably, or serve as a basis for explaining how it applies in certain contexts.

The classification of the concept into different schools of thought has also provided the theoretical framework for appreciating the philosophies underpinning the diverse approaches, with greater emphasis on the judicial and legislative perspectives in this regard. This study posits that this judicial perspective can be gleaned at the inception of the risk allocation process when judges adjudicate in cases in which neither the contract parties nor legislation have made provision on how the economic consequences of the occurrence of a specific event shall be allocated. The courts make this allocation based on principles of law, which could then be modified by contract parties using their contract provisions. The courts are then called upon to consider the modified allocation mechanism by the contract parties, and could either agree or disagree with it.

Where they disagree, the courts could interpret the contract in a manner that reinstates their previous position, or in an entirely different way. This could trigger the legislature to intervene to order the behaviour of contract parties with legislation that overrides the position(s) of either or both the contract parties and the courts. The justification for legislative intervention would be to ensure conformity with societal expectations of commercial transactions and desirable allocation mechanisms. The contract parties could then seek to circumvent legislative intent by further contractual provisions, and this process continues in an iterative manner. This is further explained in this study.

The categorisation of risk management into steps and strategies infuses clarity into the character and intent of *risk allocation* as a risk management strategy, which is the core of this study. The

study finds that the ultimate objective of risk allocation is to determine how the economic consequences of the occurrence of specific events will be borne by the parties to the contract. To undertake this function effectively, the consequences from actions and omissions have to be identified, and a determination of whether these consequences have a positive, negative or neutral effect upon a party has to be made. Thus, an understanding of which of the acts or omissions give rise to particular consequences is crucial in order to determine what steps or strategies can be adopted to influence and engender particular preferred outcomes.

The study has shown that parties in a commercial arrangement (drilling contracts included) actually engage in all the strategies in the course of their risk management journey, even though the timing and sequence may differ. In this study, therefore, 'risk allocation' is used coterminously with other risk management strategies as the context may permit.

Having established the theoretical basis of risk and risk allocation, it is necessary to examine risk within the context of the drilling process, how they arise from that process, and how these are then reflected in the drilling contract. Although the model contracts serve as the context and case studies of the thesis, discussions in the next chapter will focus on drilling contracts in general and not particularly on any of the model contracts. Given the fact that the drilling process is subsumed within the petroleum oilfield lifecycle, the examination will begin with a discussion of that lifecycle and exactly where drilling and the drilling contract feature therein.

Chapter 2

THE PETROLEUM FIELD LIFECYCLE AND THE DRILLING CONTRACT

Introduction

In this chapter, the focus is on the drilling process, and where it fits into the hydrocarbons exploration, appraisal, development and production value chain. Importantly, this discourse will highlight the risks arising from the offshore drilling process, and how these risks are then catered for under the drilling contract. In the first instance, this requires a discussion about the lifecycle of the petroleum field, followed by a closer examination of the offshore drilling process and the risks incidental thereto.

Thereafter, the study will focus on the drilling contract and how the risks identified from the drilling process have been crafted into responsibilities for the contract parties. This will entail an examination of the relationship between the primary parties – the operator and the contractor. Although non-operators under the joint operating agreement (JOA) are not parties to the drilling contract, they play a role in it that is also examined. The study makes the point that risk may not always be coterminous with responsibility, and the way in which contract parties then allocate risks under the drilling contract is examined in a subsequent chapter.

2.1 Phases in the Petroleum Lifecycle

A petroleum field goes through different phases in its lifecycle, and the requirement for drilling is at the core of this process. With drilling comes the risks incidental thereto, and in this section, the study situates the attendant risks within the drilling process to provide further clarity on the nexus between risks and the activities that are undertaken during the drilling process. This discourse further provides context for the entire discussion on risk allocation as it will become

clear that risks are not necessarily borne by the party who created them, as contract parties may then choose to allocate the responsibility for bearing the economic consequences of the occurrence of the risk events differently.

Although there is no agreement on the nomenclature of the different phases of the drilling lifecycle,²⁵⁴ there seems to be agreement on the critical activities that characterise each phase, as well as their key components and objectives. Thus, a commentator²⁵⁵ has categorised this lifecycle into the following phases:

2.1.1 Gaining Access

In this phase, a decision is made in respect of the contract area to be pursued in the quest for hydrocarbons. This decision turns on the perceived *prospectivity* of the area, which is essentially the value that the investor attaches to it, depending on a range of factors such as the potential for finding hydrocarbons in commercial quantities, as well as the regulatory framework and socio-political stability of the host country. The higher the prospectivity of a given area, the more likely that an operator – and other co-venturers – will bid for it, and will be willing to pay an amount reflective of the perceived value attached. This stage has been referred to as the ‘lifeblood’ of an exploration and production company, without which there would be no petroleum oilfields to discover, or projects to develop.²⁵⁶

²⁵⁴ Mildwaters, K. (2016) Oil and Gas: Commercial Contracts Matrix. Dundee, UK: University of Dundee, Scotland, Unpublished Work.

²⁵⁵ *Ibid*, at p. 5.

²⁵⁶ Inkpen, A. C. and Moffett, M. H. (2011) *The Global Oil & Gas Industry: Management, Strategy & Finance*. Tulsa, Oklahoma: PennWell Books, at p. 124.

2.1.2 *Exploration*

Once the operator is granted access to the area via the petroleum authorisation, there follows the exploration phase in which petroleum geologists²⁵⁷ and geophysicists²⁵⁸ search for evidence of hydrocarbon deposits beneath the surface of the earth.²⁵⁹ Essentially, this involves conducting geological and geophysical surveys on the prospective area, guided either by visible features on the surface of the earth, such as oil seeps, or by more sophisticated seismic surveys.²⁶⁰ When the results from the seismic surveys have been analysed and evaluated against some set criteria with a satisfactory outcome, the operator makes the decision to drill an exploration well in order conclusively to validate the survey's findings. To do this, the operator needs to hire the services of a drilling contractor, and it is at this point that the drilling contract is first utilised. This is discussed in more detail below.

2.1.3 *Appraisal*

In this phase, the operator's objective is to establish whether the hydrocarbons that have been discovered can be exploited economically, as well as the best way to do this from a range of technical options. The necessity for this phase is controversial, especially when the exploration phase reveals the presence of hydrocarbons. Some operators prefer to go straight from the exploration phase to the production phase, which enables them to start producing faster and recoup their investments earlier. However, that strategy may be fraught with a lot of risks, especially in respect of the estimation of the true quantity of the find – the reserves – and the

²⁵⁷ This individual is one who specialises in exploring and developing petroleum reservoirs.

²⁵⁸ This individual specialises in the physical properties and processes of the earth and space environment, including its shape, rock formation and internal structure, and analyses these by quantitative methods.

²⁵⁹ Hyne, N. J. (2001) *Nontechnical Guide to Petroleum Geology, Exploration, Drilling, and Production*. 2nd ed. Tulsa, Okla.: PennWell, at p. 195.

²⁶⁰ The seismic survey is a form of geophysical survey which measures the earth's properties using physical principles like thermal, electric, gravitational, elastic and magnetic theories. It tries to deduce the elastic properties of materials by measuring their response to elastic disruptions called seismic (or elastic) waves. See, generally, Conaway, C. F. (1999) *The Petroleum Industry: A Nontechnical Guide*. Tulsa, Okla.: Tulsa, Okla.: PennWell, at pp.46–51.

sizing of the production facilities²⁶¹. To ascertain accurately the volume of the reserves, technical requirements, opportunities and threats surrounding producing the hydrocarbons economically, there may be the need to drill additional wells. Yet again, the services of a drilling contractor are required, necessitating a drilling contract.

2.1.4 Development

After the results of the appraisal phase are analysed, and it has been determined that the volume of hydrocarbons makes economic sense to develop, a feasibility study is commissioned. The study's purpose is to determine the technical and economic strategy to be adopted in producing the hydrocarbons, and will include information on the surface and subsurface facilities, operation and maintenance philosophy, resource requirements, and the budget for implementation, among others. All this information will be detailed in a document called the *Field Development Plan* (FDP), which becomes the most critical document for engaging stakeholders including the government, regulators, investors, and financial institutions, who all play a key role in the approval and implementation of the plan.²⁶² Upon approval, the operator can commence the detailed design of the facilities, trigger the procurement process for the requisite construction materials, and start fabricating with the materials when procured. This phase culminates with the installation, testing and commissioning of the facilities that are now ready for production.

2.1.5 Production

This is the phase in which the hydrocarbon crude oil and gas are obtained in tradeable quantities, and is the culmination of all the effort and expense of the previous phases. However, to do this,

²⁶¹ Mildwaters, K. (2016) Oil and Gas: Commercial Contracts Matrix, *supra*, at p. 17.

²⁶² See, for instance, the Oil & Gas Authority, the UK government agency responsible for approving FDPs <https://www.ogauthority.co.uk/exploration-production/development/field-development-plans/>; accessed 9 February 2018.

production wells need to be drilled,²⁶³ necessitating, again, the services of a drilling contractor, and a drilling contract. Production is undertaken in accordance with the operation and maintenance philosophy outlined in the FDP discussed above, and includes every aspect of that process until the hydrocarbon is safely evacuated for onward sale. As production progresses, three sub-phases can be identified. The first is the *build-up period*, in which the production wells are brought on stream in a structured manner,²⁶⁴ with preference given to better-performing wells, and a constant monitoring and juggling to ensure that the highest production is achieved with an optimal combination from the different wells: this process is known as *production optimisation*. The next is the *plateau period*, in which optimality has been achieved and the wells are producing in line with expectation and technical predictions. The duration of this period may be different in different fields. The last is the *decline period*, in which the useful life of the well is coming to an end, either because it has attained its reserves limit or because technical difficulties make it uneconomical or impractical to continue flowing the well. Before a decision is made finally to shut in the well, the operator might utilise some production optimisation or enhancement strategies, including artificial lift²⁶⁵ or workover intervention.²⁶⁶ The scope of work will determine the nature of the intervention to be adopted. Thus, where the scope of work is a rig re-entry to drill further into the hydrocarbon-bearing sands, the services of a drilling contractor are required, as well as a drilling contract.

²⁶³ Government, UK. (2013) *Planning Practice Guidance for Onshore Oil and Gas*. London, UK: Department for Communities and Local Government.

²⁶⁴ Mildwaters, K. (2016) Oil and Gas: Commercial Contracts Matrix, *supra*, at p. 22.

²⁶⁵ When artificial means are utilised to increase the flow of crude oil or other liquids, from a production well. This is usually achieved by using mechanical devices inside the well or by injecting gas into the crude oil to reduce the weight of the hydrostatic column.

²⁶⁶ This is the process of undertaking major maintenance or repair works on an oil or gas well. It usually involves invasive techniques, such as coiled tubing, wireline, or snubbing. Sometimes, it could entail the pulling and replacement of a completion, which is a more rigorous and expensive process.

2.1.6 Decommissioning

Whether production optimisation and enhancement strategies have been implemented or not, there comes a point at which the well is no longer flowing as optimally as it should, and it becomes uneconomical to continue to flow it. If the net cash flow turns negative, the field is decommissioned, together with the production infrastructure, and the wells will be plugged and abandoned.²⁶⁷

2.1.7 Post-Decommissioning

This phase involves the removal of the production infrastructure upon decommissioning. The overarching aim is to restore the environment to the *status quo ante* as much as possible, even though this is difficult in practice. Furthermore, several fundamental issues are raised in this phase, especially relating to residual liability upon decommissioning. Detailed discourse of this is outside the scope of this study. However, suffice it to say that this area has been receiving attention in recent times, with some governments, for instance in the UK, already regulating that space,²⁶⁸ and some operators having already started on their compliance journeys.²⁶⁹

2.2 The Drilling Process

The drilling process commences with the design of the well, and the most critical feature of this stage is the establishment of the drilling objectives and design premises.²⁷⁰ This is essentially the point at which the drilling engineers synthesise engineering principles with corporate objectives, philosophy and experience, to ensure that a well that is fit for purpose is drilled safely

²⁶⁷ Hyne, N. J. (2001) *Nontechnical Guide to Petroleum Geology, Exploration, Drilling, and Production*, *supra*, at pp. 448–449.

²⁶⁸ See, for instance, the guidelines by the UK Government's Department of Business, Energy and Industrial Strategy on the subject: <https://www.gov.uk/guidance/oil-and-gas-decommissioning-of-offshore-installations-and-pipelines>; accessed 9 February 2018.

²⁶⁹ See, for example, Shell's Brent Field decommissioning: <https://www.shell.co.uk/sustainability/decommissioning/brent-field-decommissioning/decommissioning-in-the-uk.html>; accessed 9 February 2018.

²⁷⁰ Aadnøy, B. S. (2010) *Modern Well Design*. Rotterdam, Netherlands: CRC Press, at p. 1.

and cost-effectively. The engineering principles include the selection of the optimal mud weight, depth of the well, and casing sizes. These parameters would, in turn, determine the type of rig to be utilised for the drilling activity. When the well design has been finalised, it is usually discussed with government authorities to secure their approval, and to confirm that drilling is proposed to be undertaken in line with the petroleum authorisation as well as extant regulatory framework. Where a well is not properly designed, it could lead to a failure of the drilling campaign, or to more catastrophic consequences. For instance, in the aftermath of the Macondo disaster, BP was accused of having a poor well design that caused the failure of the cement barrier that should have prevented hydrocarbons from accessing the rig and causing the blowout.²⁷¹

After the well design has been completed, the rig selection process commences. This presupposes that the requisite approvals – for the work, plan and budget – have been obtained. The selection process would typically entail the launching of a bid process in which the well design parameters and work plan would be issued to bidders – drilling contractors – based on which bids can be submitted. The bid package would typically include the drilling contract template that the operator wishes to utilise when the bid process is eventually concluded. It is typical to have negotiation meetings with shortlisted drilling contractors, during which technical, financial and contractual matters are discussed. It is also typical to inspect the shortlisted rig to ensure that it is not only fit for purpose but also in a good state of repair. An agreement is usually reached between the operator and the contractor on the timeline and cost of rectifying any issues identified during inspection. The culmination of this process is the signing of the drilling contract, which details all the agreements reached by the contract parties and includes a

²⁷¹ Mason, R. (2011) ‘Transocean Blames BP's Oil Well Design for Gulf of Mexico Disaster’, *The Telegraph*, 22 June 2011. Available at: <https://www.telegraph.co.uk/finance/newsbysector/energy/8592126/Transocean-blames-BPs-oil-well-design-for-Gulf-of-Mexico-disaster.html>; accessed 15 March 2018.

commitment by the drilling contractor to drill the well safely and in accordance with the well design.

When the drilling contract has been finalised and the rig has been selected, the government authorities are engaged in order to obtain the requisite approvals and permits. As part of the approvals process, government authorities sometimes inspect the selected rig, and may require modifications to be made to comply with existing laws. Approvals and permits are typically issued when the government authorities are satisfied with the well design and drilling programme, and that the selected rig is compliant and fit for purpose.

The next stage is the mobilisation of the rig and the relevant personnel to the offshore well location. However, prior to this happening, the operator must ensure that the well location is sound and safe enough for the rig to conduct drilling operations. The operator would typically commission a geotechnical survey of the seabed to understand the subsurface conditions of the well location. The results of this survey are passed to the drilling contractor and are then used to prepare for mobilising and positioning the rig when it arrives at the well location, and is prepared to commence drilling operations. Depending on the type of rig and the depth of the water, either the rig is moored or its legs are jacked down to the sea bottom to secure it. The requisite checks to further ensure preparedness are undertaken after which the rig is ready to commence drilling operations.

Modern drilling is now undertaken with rotary drilling rigs, a name that reflects the fact that the rigs are powered by rotary drilling systems,²⁷² which rotate a steel pipe that has a drill bit at the

²⁷² This rotary system is made up of four main components: diesel engines called *prime movers* which supply power to the rig; *hoisting system* useful for lifting, lowering and suspending equipment in and out of the well; *rotating system* cuts the hole, and is comprised of the drill bit, drillstring and drillpipe; *circulating system* for pumping the mud into and out of the hole. See, generally, Conaway, C. F. (1999) *The Petroleum Industry: A Nontechnical Guide*, *supra.*, at pp. 98–108.

end of it.²⁷³ The drilling bit rotates on the rock to cut the hole – the *wellbore* – and, with the aid of the drill string, grinds and crushes the rock into small particles called *cuttings*. These cuttings are washed away from the surface of the rock with drilling mud.²⁷⁴ The drilling mud is pumped down the drill pipe and exits through small pores in the drill bit to wash away the cuttings. It then flows back to the well surface, where the cuttings are separated from the drilling mud with mesh filters called *shakers*, treated and then disposed of as waste in line with the regulations of the host country.

While drilling the well, progress will be constantly monitored, with several tests and analyses being carried out. The duration of the drilling process varies and, depending on the depth of the reservoir being targeted, as well as the rock type being drilled, can go on for a few weeks to a few months. Sometimes, *directional drilling technology* is utilised if the targeted reservoir is not directly below the wellbore. This technology enables drilling to be conducted at an angle capable of accessing a reservoir that may be several hundred metres away or, for offshore wells, several thousand metres away from the wellbore.

When the target reservoir is reached, specialised pieces of equipment called logging tools are utilised to assess the formation and analyse the fluids to verify whether hydrocarbons are present. If their presence is confirmed, flow tests are often performed to assess the production capability of the well. While such tests²⁷⁵ are being conducted, any gas that is produced is typically flared, while oil or condensate is stored in receiving tanks and thereafter safely evacuated.

2.3 Incidental Risks

²⁷³ Hyne, N. J. (2001) *Nontechnical Guide to Petroleum Geology, Exploration, Drilling, and Production*, *supra.*, at p. 247.

²⁷⁴ The drilling fluid is called ‘mud’ due to its appearance. It is made up of water and other additives, such as bentonite clay, which adjust its viscosity and density to make it compatible with the rock.

²⁷⁵ The flow tests are also called *drill stem tests* (DSTs) or *well tests*, and usually last for around two weeks.

Several challenges could be encountered while drilling, some with more impact than the others. In extreme circumstances, these problems can cause death, bodily injury or property loss or damage. The challenges that are discussed in this section are those directly related to some of the risks discussed in the study, and are not exhaustive of the challenges that could be encountered while drilling.

2.3.1 Fish Presence

A usual challenge that occurs during drilling is that something either falls into the well, or breaks while being used in it. For instance, a tool can fall into the well from the rig floor, or a drillstring can break off and fall into it. In both cases, the normal drill bit is unable to drill through the foreign body, and drilling needs to be suspended to attempt a retrieval. The foreign body is called a *fish*, and the retrieval process is called *fishing*, while the tools utilised for retrieval are called *fishing tools*.²⁷⁶ In some cases, it is impossible to retrieve the *fish*, which typically belongs to the contractor and forms part of *contractor items and property* – a situation that gives rise to the need for replacement. In other circumstances, the retrieved *fish* is either damaged beyond repair or repairable at a cost. Sometimes, drilling activities must be suspended to enable the repairs to be carried out.

2.3.2 Stuck Pipe

The drillstring²⁷⁷ can get stuck in the well, because of either *differential wall pipe sticking* or mechanical challenges. The former occurs when the drillpipe sticks to the well walls because of suction, or a differential between the pressure of the mud column inside the well and the

²⁷⁶ Hyne, N. J. (2001) *Nontechnical Guide to Petroleum Geology, Exploration, Drilling, and Production*, *supra.*, at pp. 275–277.

²⁷⁷ A string of drillpipe that conveys torque and drilling fluid to the drill bit, and refers to the drill bit, drill collars drillpipe, and tools when they are assembled.

pressure of the formation at the bottom.²⁷⁸ The pressure difference pushes the pipe so strongly against the side of the hole that it becomes immobile. Pipe sticking due to mechanical challenges arises when there is a significant deviation in the well that is greater than 30 metres, and is usually caused when there is a marked change in the weight of the drill bit while drilling is ongoing. This situation is also known as *dogleg*, and it results in the drillpipe scraping against a groove inside the well that is smaller than the groove made by the drill bit.²⁷⁹ In some cases, it is impossible to retrieve the stuck pipe, which typically belongs to the contractor and forms part of *contractor downhole equipment*. In other circumstances, the retrieved pipe is either damaged beyond repair, or repairable at a cost. Here, again, drilling activities may be suspended to enable the repairs to be carried out.

2.3.3 Formation Damage

During drilling, a part of the drilling mud called the *mud filtrate* may escape into any rock that is adjacent to the wellbore and is permeable. Depending on the pressure of the *mud filtrate*, it could either decrease the permeability of the reservoir rock, or destroy it. Where permeability is decreased, the well can be restored by well stimulation such as hydraulic fracturing.²⁸⁰ However, where permeability is destroyed, the well is killed and abandoned.

2.3.4 Sloughing Shale

During drilling, shale²⁸¹ may react with brine or water, causing it to increase in size, forming large balls and particles, that then fall to the bottom of the well. The drilling mud cannot easily remove these large particles, and needs to be enhanced by chemicals such as potassium; oil-

²⁷⁸ Hyne, N. J. (2001) *Nontechnical Guide to Petroleum Geology, Exploration, Drilling, and Production*, Op.Cit, at pp. 277–278.

²⁷⁹ See, generally, Conaway, C. F. (1999) *The Petroleum Industry: A Nontechnical Guide*, *supra*, at pp.114–117.

²⁸⁰ This is a well stimulation method in which the injection of high-pressure fracking fluid fractures a rock. The fluid creates cracks in the wellbore in the deep-rock formations so that hydrocarbons and liquids will flow freely.

²⁸¹ Sedimentary rock which is fine-grained and impermeable, made up of clays and some other minerals, including quartz.

based drilling mud can also be utilised to dislodge the particles. Typically, a lot of drilling mud and chemicals are required to remove such particles, and this is an expensive process overall.

2.3.5 Corrosive Gasses

During drilling, some corrosive gases such as hydrogen sulphide (H₂S) and carbon dioxide (CO₂) can egress the reservoir rocks into the well. These gases destroy the steel on the drillstring and generally cause hydrogen sulphide embrittlement.²⁸² They can also cause damage to the environment or to the contractor's other equipment.

2.3.6 Kicks and Blowouts

A *kick* is a well control challenge in which the pressure within the rock being drilled is higher than the hydrostatic pressure in the drilling mud acting on the rock face or the borehole. When this happens, the formation pressure, which is greater, tends to force fluids from the formation into the wellbore. Sometimes, the formation pressure causes a mixture of mud and gases to be spewed to the surface, and this is known as a *mud volcano*. The forced fluid surge is a *kick* and, where the flow is controlled successfully, the *kick* is expressed as killed. Where it is uncontrolled, and increases in severity, a *blowout* occurs, which has catastrophic consequences on lives and property, and is capable of causing multiple fatalities all at once.²⁸³ A fallout of a *blowout* may be the total loss of the rig and the mess caused by the resulting debris, which needs to be removed.

2.3.7 Pollution

During drilling, the drilling mud and other consumables are typically kept on the rig floor until they are required to be sent down to be utilised in the well. It is not uncommon to have spillages

²⁸² This is when metals such as steel become brittle and then fractures because of the introduction and circulation of hydrogen.

²⁸³ As it happened in Macondo disaster in the Gulf of Mexico.

occur during this interval, with the drilling mud and other consumables entering the sea thereby causing pollution. Pollution can arise from surface activities and contractor equipment, or from the activities below the surface, especially when well control is lost. When pollution occurs, it creates the obligation to remediate the impacted environment and to replace or repair any damaged equipment. In extreme cases, death or bodily injury could occur, either to the personnel working on the rig or to third parties.

2.3.8 Weather

Offshore drilling can sometimes be marred by extreme weather conditions. These conditions include strong winds and storms, thick fog and freezing cold temperatures, all of which affect the ability of personnel to function properly. These conditions not only impair transportation of man and materials to the well location, but also affect the integrity of materials to be utilised for drilling operations and, thus, drilling outcomes. This inevitably causes delays to the drilling programme, with attendant implications for cost. In extreme circumstances, weather-related accidents can occur, leading to deaths or bodily injuries, as well as property loss or damage.²⁸⁴

2.3.9 Fire

The drilling process is a very complex and extremely volatile one. Indeed, this was recognised by the court in *Caledonia North Sea Ltd v London Bridge Engineering Ltd*, in the aftermath of the Piper Alpha disaster, which stated as follows:

‘Operations to exploit the oil and natural gas resources of the North Sea...are potentially hazardous. It is plain beyond doubt that an oil platform is a dangerous place unless careful and proper safety precautions are taken. The platform holds contained under pressure large quantities

²⁸⁴ See, generally, the Report to the President by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling that was released on September 14, 2011. The report can be accessed here: <https://cybercemetery.unt.edu/archive/oilspill/20121210172821/http://www.oilspillcommission.gov/>.

of gas and liquid hydrocarbon material which is explosive, very flammable and most dangerous if control of it is lost'.²⁸⁵

There are different possible causes of fire on a drilling rig. The principal cause is human error, which is due to either negligence, wilful misconduct or incompetence. Another possible cause is equipment failure, as was the case in the Macondo disaster in which the blowout preventer (BOP) failed. Fire can also be caused by geological or geophysical challenges in the formation, typically manifesting in extreme pressure in the wellbore that causes an explosion if the drillers lose control of the well. In all these instances, the result can be catastrophic, leading to death, bodily injury, property loss or damage. Furthermore, fire events inevitably lead to cessation of drilling activities to ensure that proper investigations are carried out, and adequate safety measures implemented to prevent a re-occurrence. This wastes time, delays drilling progress and escalates cost.

2.3.10 Equipment Failure

This occurs due to various reasons. It may be that the wrong type of equipment is being used, the equipment is defective or the equipment is damaged. Damage to equipment can occur during drilling, due to human error and intervention, or because of external factors such as weather conditions. The impact of equipment failure or damage on drilling operations varies, depending on the criticality of the equipment. For instance, if the *top drive*²⁸⁶ fails in service, this can grind drilling operations to a halt, as this equipment lies at the heart of drilling operations. The contractor is required visually to check equipment for patent defects prior to use, whether the equipment belongs to it or to the operator. Where a defect is discovered but ignored, or could

²⁸⁵ (2002) UKHL 4.

²⁸⁶ The *top drive* is a motor suspended from the mast or derrick of the rig, and is utilised in rotating the drill string while drilling. It is the substitute for the conventional rotary table, and enables simultaneous drilling of the longer drill pipe sections.

have been discovered upon inspection but was not, the resulting adverse event or consequence becomes a matter of contention, as the issue would transcend mere equipment failure to questions of human error, involvement and competence. This process also wastes time, delays drilling progress and escalates cost.

2.3.11 Accidents

Drilling operations are very complex, as highlighted above. One way to ensure that operations are conducted in a safe, consistent and approved manner is to issue standard operating procedures (SOPs) for every aspect of the operations – not only for actual drilling operations, equipment handling and storage, but also for more general issues such as evacuation and other emergency procedures. Personnel are trained in these SOPs to ensure that they understand their contents, and measures are instituted to ensure compliance and monitor deviation. Part of these measures include *toolbox meetings*,²⁸⁷ which are supposed to be held at the start of every shift during drilling operations; such meetings serve as the medium for evaluating the tasks for the day and the applicable SOPs.

Unfortunately, despite these measures, personnel sometimes ignore SOPs, and this a major cause of accidents. Part of the SOPs focus on communication protocols concerning all aspects of operations, especially between teams and shift personnel. Again, ignoring such protocols have led to accidents, the chief example of which is the Piper Alpha disaster, which, to date, is the world's worst offshore drilling incident.²⁸⁸ Accidents also occur when personnel have been

²⁸⁷ Toolbox meetings are informal safety meetings that form part of a company's safety programme. They are typically conducted at the job site at the beginning of a job or work shift. They cover topics on safety aspects related to the task at hand, such as workplace hazards and safety practices. They are sometimes called tailgate meetings or safety briefings.

²⁸⁸ The disaster occurred because of a gas leakage from a condensate pipe at the platform, which had the pressure safety valve of the injection pump removed for routine maintenance during the day shift, with the open pipe being sealed with two blind flanges temporarily. The flanges remained in place during the change in the crew shift because maintenance work had not been completed. The day-shift engineer had updated the task permit stating that under any circumstances was the condensate-injection pump to be switched on. Unfortunately, communication errors

negligent in undertaking assigned tasks. This happens when personnel do not take reasonable care in discharging their obligations, as a result of which an adverse event occurs. Personnel who disregard SOPs in the conduct of a task, which then results in an accident, may be held to have acted negligently.

When accidents occur, they lead to death, bodily injury, property loss and damage. Such events necessitate a cessation of drilling activities to ensure that personnel evacuations are conducted, proper investigations are carried out, and adequate safety measures implemented to prevent a re-occurrence. This wastes time, delays drilling progress and escalates cost. Where the accident has led to a total loss of the rig, as happened in the Piper Alpha disaster, this brings the drilling campaign to an abrupt end, with attendant cost, resource and reputational implications.

2.3.12 Collisions

Drilling operations are supported by a vast number of personnel and materials that need to be transported to the rig. Typically, crew changes and transportation of large and routine materials are done by supply vessels, while a limited number of personnel and emergency materials can be flown in by helicopter, provided that they meet the safety and size threshold for this mode of transport. While supplying the rig, accidents can occur, and supply vessels can collide with the rig because of a variety of reasons, among which are incompetence of the vessel master, human error, weather conditions or equipment failure.²⁸⁹ When collisions occur, typically, this causes damage to the rig and the supply vessel, which may lead to temporary suspension of drilling

meant that the night crew staff did not find the task permit, and turned on the pump after the second pump failed. This action resulted in escape of gas condensate from the two blind flanges, leading to explosions on the rig platform.

²⁸⁹ See, for instance, *R. v McNair (Donald Niven)* (1989) 11 Cr. App. R. (S.) 465; MarEx (2011) ‘Supply Ship Collides with Transocean Drill Rig off Newfoundland’; The Maritime Executive. Available at: https://www.maritime-executive.com/article/supply-ship-collides-with-transocean-drill-rig-off-newfoundland#gs.zK=_vBg; accessed 22 January 2018.

operations to effect any required repairs and implement safety measures that prevent a re-occurrence. The implication of any suspension of work has already been noted.

The foregoing contextualises risk within the drilling process. As noted above, the problems discussed are not exhaustive of all those that could arise during the drilling process and, by extension, they do not represent the totality of risks incidental thereto. For instance, if, during the drilling process, it is discovered that the contractor did not provide a critical equipment to control kicks and blowouts, this may be a basis for asserting that the contractor failed to perform their obligations in a workmanlike manner, with due skill, care and judgment.

2.4 Risk, Responsibilities and Relationships in a Drilling Contract

Having introduced the drilling contract within the drilling process, and the risks incidental thereto, this section focuses on the nature of the relationship of the contract parties within the offshore drilling context. This relationship is regulated by contract, and defined by the scope of responsibilities to be undertaken by the parties, the risks incidental thereto, and how both responsibilities and risks have been allocated *inter se*. This study takes the position that risk may not always lie where responsibility resides, as the parties may have allocated risk differently.

In examining this relationship, the study recognises that where contract parties fail in their responsibilities, adverse events can occur, arising from the risks inherent in the drilling process. Thus, this section will ask and answer questions as to which responsibilities are shared between the contract parties and how the drilling contract splits these up. Subsequently, an examination of the way in which they then allocate the risks attendant thereto, and why have they allocated both risks and responsibilities in that manner, is undertaken.

Although the relationship in a drilling contract is primarily between the operator under the joint operating agreement (JOA) and the contractor, the interface with the non-operator under the JOA will also be discussed. Most operators in drilling contracts are in joint ventures with other co-venturers, who, though not being operators or parties to the drilling contract, nevertheless contribute financially and administratively to the attainment of the drilling contract objectives, arising from the rights conferred, and the obligations imposed, upon them by their joint operating agreements. Depending on the way in which the drilling contract is structured, such non-operators may be contract parties conferred with rights within the drilling contract that elevate them to the same status as the operator and contractor. It is therefore necessary that this relationship with the non-operator is also examined to determine its implications for risk and responsibility allocation within the drilling contract.

Like any other contract, the drilling contract is a document of obligation. Such obligations are captured within the responsibilities that are shared between the contract parties, and are ordinarily the product of law and negotiations geared towards achieving the mutual objectives agreed by them. At the heart of the drilling contract is the requirement to conduct drilling operations; this is the primary reason for an operator procuring the services of a drilling contractor. However, there are other ancillary regulatory and compliance requirements that impact the way in which the contract parties conduct drilling operations. Furthermore, even though the contractual relationship is primarily between the operator and contractor, third-party services and interests of the non-operators are integral aspects of this relationship. The major scope of responsibilities and the impact on third parties are examined below.

2.4.1 Drilling Operations

Drilling operations are the crux of the drilling contract and encompass all activities that the parties are required to undertake to drill and, if necessary, complete,²⁹⁰ sidetrack,²⁹¹ suspend or abandon a well in accordance with the law, the agreed drilling programme, good drilling practice and the contract. As might be expected, the scale of the drilling operations requires that the operator and contractor share responsibilities to make the campaign a success. The main responsibilities are discussed below.

2.4.1.1 Provision of the Drilling Unit

The drilling unit for offshore activities is also called the *mobile offshore drilling unit* (MODU), and has been defined as ‘a mobile platform, including drilling ships, equipped for drilling for subsea hydrocarbon deposits and mobile platforms for purposes other than production and storage of hydrocarbon deposits’.²⁹² In common parlance, the MODU is also known as a ‘drilling rig’ and, in this study, the terms ‘drilling unit’, ‘drilling rig’ and ‘rig’ will be used interchangeably.

Perhaps the most important responsibility in this regard is to ensure that the specifications of the drilling rig are accurate and correctly understood by all the parties. According to industry practice, it is the responsibility of the operator to issue such specifications, driven by factors such as the well design, depth of the well to be drilled, the subsea and geotechnical conditions of the well location, safety considerations, cost, innovative technology, well configuration (single or multi), power ratings, capacity of top drive, mast, mud pumps and mud tanks. Where these specifications are inaccurate, unfit for the required purposes or wrongly communicated, the rig

²⁹⁰ This is the process of getting a well ready to produce, and entails priming the bottom hole to contract specifications, setting the production tubing and down-hole tools, and, if necessary, stimulating and perforating. This could also include cementing the casing if required.

²⁹¹ This means re-entering a well from the surface to deviate from the existing well bore, either to resolve a challenge encountered in the existing bore, or to produce hydrocarbons from another zone or bottom hole location.

²⁹² ISO 17776: 2016, Petroleum and Natural Gas industries - Offshore Production Installations - Major Accident Hazard Management During the Design of New Installations, Second ed, December 2016.

will be unusable, which may lead to increased cost exposure to make it fit for purpose.²⁹³ If the specifications have been correctly communicated, but the contractor still brought a rig that was not fit for purpose, the operator reserves the right to treat this as a breach of contract, entitling the operator to terminate the contract.²⁹⁴

In certain instances, the contractor could make the obligation to provide the drilling unit subject to rig availability. This inevitably impacts on the commencement date of the drilling contract, as drilling operations cannot commence without the rig being firmly secured. This is why drilling contracts usually make a distinction between ‘effective date’ and ‘commencement date’. While the former indicates when the parties entered into the agreement with the intention of creating legal relations, the latter is triggered when the contractor has given the operator written notification that the drilling unit is ready.²⁹⁵ In most cases, the contractor would undertake to use ‘best endeavours’, ‘reasonable endeavours’ or ‘all reasonable endeavours’ to procure rig availability by the expected commencement date. Such an undertaking raises an issue as to the nature of the obligation imposed by these different provisions, as well as the distinction between them and the extent thereof.

In the first instance, the courts have attempted to draw a distinction between ‘best endeavours’ and ‘reasonable endeavours’, and different approaches, sometimes conflicting – and, at other times, confusing – have emerged from this exercise. For instance, in *Terrell v Mabie Todd & Co Ltd*,²⁹⁶ the court found that ‘best endeavours’ imposed the obligation to do all that could be reasonably done in the specific circumstances, while in *Overseas Buyers v Granadex*,²⁹⁷ the court

²⁹³ *Petromec Inc v Petroleo Brasileiro SA Petrobras* (2013) EWCA Civ 150.

²⁹⁴ See, for instance, *Amoco (UK) Exploration Co v British American Offshore Ltd* (2001) All ER (D) 244 (Nov).

²⁹⁵ In this context, this means when all inspections, tests and repairs required to be carried out on the drilling unit and ancillary equipment have been satisfactorily completed, and the drilling unit ready for movement to the well location to commence drilling operations.

²⁹⁶ (1952) 69 RPC 234.

²⁹⁷ (1980) 2 Lloyd’s Rep 608.

held that it meant something different from doing all that was reasonably expected. Indeed, the use of the word ‘reasonable’ in describing ‘best’ endeavours further confuses the issue, as both words could be interpreted as meaning the same thing, which was the approach in *IBM v Rockware Glass Ltd*.²⁹⁸ In acknowledging the onerous obligation imposed by ‘best endeavours’, the courts have further held that while the obligor may be expected to incur expenses to meet this obligation,²⁹⁹ the expenditure cannot be such that exposes it to economic ruin, or loss of goodwill or commercial standing.³⁰⁰

In interpreting ‘reasonable endeavours’, the courts have approached it from the perspective of an objective standard that enquires into what an ordinarily competent individual who is similarly circumstanced might do, stating that a balance between the obligor’s obligation to the other party and the protection of its own financial interests had to be struck.³⁰¹ The reference of the court to the protection of financial interest, which takes into consideration the same relevant commercial parameters such as cost and practicality as ‘best endeavours’, further confuses the clarity in distinction.³⁰² However, in *Rhodia International Holdings v Huntsman International*,³⁰³ the court stated that while ‘reasonable endeavours’ implied the obligation to pursue at least *one* course of action out of many reasonable options, ‘best endeavours’ required that *all* reasonable courses of action must be explored and exhausted. Although the court tried to infuse clarity by this distinction, the reference to ‘*all reasonable courses of action (endeavours)*’ – emphasis added – in defining ‘best endeavours’ defeated this purpose.

²⁹⁸ (1980) FSR 335.

²⁹⁹ *Jet2.com v Blackpool Airport Ltd* (2012) EWCA Civ 417.

³⁰⁰ *Rackham v Peek Foods Ltd* (1990) BCLC 895.

³⁰¹ *Rhodia International Holdings v Huntsman International* (2007) 2 All ER (Comm) 577.

³⁰² See, for instance, *P&O Property Holdings Ltd v Norwich Union Life Assurance Society* (1994) 68 P&CR 261.

³⁰³ (2007) 2 All ER (Comm) 577.

In *Yewbelle v London Green Developments*,³⁰⁴ the court considered the provision ‘all reasonable endeavours’, and said that it implied that the obligor was expected to keep using endeavours until all reasonable endeavours were exhausted, even though that did not impose an obligation to incur significant cost to settle a commercial transaction.³⁰⁵ This line of reasoning was followed in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd*,³⁰⁶ in which the court held that, although all these terminologies³⁰⁷ were indicative of ‘non-absolute obligations’, the responsibility to use ‘reasonable endeavours’ was less burdensome than the responsibility to use ‘all reasonable endeavours’. It further stated that the test to be applied in determining whether the contractor had discharged the burden that ‘all reasonable endeavours’ imposed is to enquire whether they ‘had taken all reasonable steps which a prudent and determined man, acting in the interests of the receiving party, and anxious to procure the contractually-stipulated outcome within the available time, would take’.³⁰⁸

Clearly, the judicial position on this area of the law is still rife with confusion, necessitating a response by contract parties to infuse greater clarity in their contracts. One way of doing this is by defining the terms used within the context of their contract. Specifically, that definition should clarify whether the obligor is expected to incur any expenses in meeting the obligation, and the applicable threshold.³⁰⁹ It could also state the courses of actions expected and the timelines thereof. A prudent drilling contractor would keep a record of such actions, and include

³⁰⁴ (2007) EWCA Civ 475.

³⁰⁵ Contrast this with *CPC Group v Qatari Diar Real Estate Inv Co* (2010) All ER (D) 222 (Jun) where the court held that ‘all reasonable endeavours’ sometimes meant that the obligor’s commercial interest is subordinate to that of the obligee in respect of the desired objective.

³⁰⁶ (2014) SGCA 16; (2014) B.L.R. 658.

³⁰⁷ ‘best endeavours’, ‘reasonable endeavours’ and ‘all reasonable endeavours’.

³⁰⁸ *KS Energy Services Ltd v BR Energy (M) Sdn Bhd*. (2014) SGCA 16, at paras 42–44, 62–63, 82–83, 88, 91–93. The court was guided by the test which was originally laid down in *Travista Development Pte Ltd v Augustine* (2007) SGCA 57.

³⁰⁹ See, generally, Cannon, N. (2014) *Best Endeavours, All Reasonable Endeavours and Reasonable Endeavours*. London: Walker Morris. Available at: <https://www.walkermorris.co.uk/publications/brief-february-2014/best-endeavours-all-reasonable-endeavours-and-reasonable-endeavours/#>; accessed: 17 January 2018.

a communication protocol that keeps the operator informed about steps taken in furtherance of the obligation to secure a drilling unit that complies with the specifications.

2.4.1.2 Location Preparation and Acceptance of the Drilling Unit

The operator has the responsibility of inspecting the rig and procuring the testing of critical equipment on board prior to accepting same as being fit for purpose³¹⁰. In this regard, the operator can accept the rig subject to any deficiencies observed, provided that the contractor remedies the deficiencies at its own cost.³¹¹ Where the operator fails to inspect the drilling unit, or fails to detect patent defects upon inspection, this should ordinarily estop them from subsequently asserting the deficiency of the rig. However, most operators avoid this outcome by passing the responsibility of producing a fit-for-purpose rig to the contractor, requiring the latter to warrant that the rig is free from any damage or defects that could reasonably be expected to interrupt or delay drilling operations if repairs are necessary.

It is crucial that the well location is adequately prepared to receive the drilling unit, and the operator is responsible for undertaking a seabed survey of the proposed location. The operator is expected to obtain geotechnical evidence of the location's suitability, and is also responsible for taking any remedial steps required to make the location fit for purpose. If the location is not adequately prepared, in consequence of which the drilling unit suffers a punch-through,³¹² the operator is responsible for whatever rig repairs are required, as well as taking further steps to ensure the suitability of the well location.³¹³

³¹⁰ For instance, the load testing of the cranes.

³¹¹ See, for instance, *Norscot Rig Management PVT Ltd v Essar Oilfields Services Ltd* (2010) EWHC 195 (Comm).

³¹² A situation that occurs when one of the rig's support legs penetrates the sea bed, causing it to slant and become unstable.

³¹³ See *Seadrill Management Services Ltd v OAO Gazprom* (2011) 1 All E.R. (Comm) 1077, in which the court held that the punch-through that occurred during 'pre-loading' was because of the negligence of the master of the rig, as the seabed conditions were known before-hand, and the rig owners accepted to bring the rig in that condition.

2.4.1.3 Provision and Maintenance of Drilling and Other Ancillary Equipment

The operator and contractor are responsible for providing different equipment for the drilling operations. While the operator is responsible for providing equipment for coring, testing and completion services, including storage tanks, drilling mud, and separator, the contractor is responsible for providing equipment such as high- and low- pressure blowout preventers; and handling tools, which include drill pipes, collars and elevators; as well as safety equipment, which includes breathing apparatus and smoke, fire and gas detectors. In most cases, the responsibility for providing equipment is not restricted to those that should be provided by the operator and contractor, but extends to the equipment of their subcontractors and other invitees. Thus, the responsibility is defined in terms of the group, and the reference is usually to '*operator group equipment*' or '*contractor group equipment*'. The implication of this is that both primary contract parties take responsibility not only for their own equipment but for those of the entities within their group, mirroring the indemnity structure of the drilling contract.

This definition of equipment in *group* terms has a more significant implication. Typically, drilling contracts define 'completion date' of the contract with reference to the date and time at which all the *operator group equipment* has been off-loaded from the rig, except where the parties agree otherwise. This means that even if the operator has offloaded all its own equipment, the drilling contract is not deemed to be completed until the operator's other contractors have offloaded their own equipment. In some cases, the operator is unable to offload such equipment on behalf of the other contractors as it may be specialised equipment that has to be demobilised utilising specialist personnel and knowledge. For instance, this is the case with cementing equipment. Thus, where there is any delay on the part of the other contractor, in consequence of

which the equipment remains on board the rig longer than the operator intends, the latter would nevertheless be responsible for the applicable rate payable for the on-going contract.

In certain instances, the operator requires the contractor to provide equipment for which the operator pays. Although the operator reimburses the contractor for such specific equipment, the drilling contract does not regard it as belonging to the class of *operator group equipment*, and the contractor retains responsibility for them.

Both parties have responsibility for inspecting and testing the equipment respectively provided by them to ascertain their fitness for purpose. For instance, industry practice is that the contractor is responsible for inspecting all drill collars, drill pipe and other down-hole equipment, while the operator inspects casings, tubings and pup joints. In addition, both parties ensure that their respective contractors and subcontractors also inspect and, where required, test the equipment provided. The results and certificates issued after such inspections and tests are supposed to be issued to the operator and, where necessary, both parties are required to carry out remedial work on any equipment that does not meet the standard agreed by both parties at their respective cost.

The above notwithstanding, the operator retains responsibility for inspecting any of the equipment provided by the contractor to ensure that it is fit for purpose. Likewise, the contractor is responsible for inspecting *operator group equipment* prior to using them, and to report any patent defects therein to the operator, allowing the latter the opportunity to repair or replace same.³¹⁴ Some drilling contracts hold the contractor responsible for any ensuing loss arising from the failure to spot any patent defect, but not for latent defects.³¹⁵

³¹⁴ See, for instance, *Amoco (UK) Exploration Co v British American Offshore Ltd* (2001) All ER (D) 244 (Nov) at para. 68.

³¹⁵ Anderson, O. L. (1989) 'The Anatomy of an Oil and Gas Drilling Contract', *Tulsa LJ*, 25, pp. 359–533, at p. 416.

To ensure that all the *contractor group equipment* provided, including the drilling unit, remain fit for purpose throughout the duration of the drilling operations, the contractor has responsibility for maintaining the equipment. In this regard, the contractor is to be guided by the standards set by the original equipment manufacturers, who issue certificates evidencing such maintenance activities upon completion. Maintenance of the *contractor group equipment* should be in accordance with the ‘contractor’s management system’, which is essentially a database that details all the planned and unplanned maintenance carried out on the equipment. The contractor is also supposed to assist the operator in maintaining *operator group equipment*. However, this is to be reimbursed by the operator. The rationale for the contractor’s responsibility to maintain *operator group equipment* is that the equipment is being utilised by the contractor for drilling operations, and so the contractor is in the best position to know when maintenance is required and to effect same.³¹⁶ Where the obligation to maintain *operator group equipment* is breached by the contractor, as a result of which the equipment falls into disrepair, this might be a ground for the operator to allege breach of contract, entitling the operator to claim for damages.³¹⁷

The equipment requires consumables such as fuel, oil, cleansing fluids, solvents and lubricants to function optimally, and the responsibility for providing these is usually shared between the operator and contractor. For instance, the drilling contract may provide that the operator supplies the fuel for the drilling unit, while the contractor supplies the lubricants. It may also provide for a reimbursement mechanism where one party makes a supply that is ordinarily the responsibility of the other party.

2.4.1.4 Provision of Personnel and Catering Services

³¹⁶ See generally *Hess Corp v Stena Drillmax III Ltd* (2012) EWCA Civ 522; (2012) 2 All E.R. (Comm) 559.

³¹⁷ *Tor Corporate AS v Sinopec Group Star Petroleum Co Ltd* (2011) CSIH 54.

Both parties have responsibility for mobilising their respective personnel to support the drilling operations. Thus, while the operator mobilises key personnel such as the company man, mud engineer and geologist, the contractor mobilises the offshore installation manager, toolpusher, driller, roughneck and derrickman. The personnel are expected to be competent, trained, suitably qualified, and sufficiently experienced properly to undertake their duties arising from the contract, and as may be appropriately assigned to them. Given the fact that the bulk of the personnel on a rig belong to the contractor, and the contractor is the party required to carry on the drilling operations, the contractor makes an express representation to the operator about the competence of the personnel provided. On the strength of this representation, the drilling contract also gives the operator the right to request the replacement of any personnel found to be incompetent in the performance of assigned duties, or deemed by the operator to be unqualified for same.

The operator also reserves the right to demand the replacement of any member of personnel who has been negligent in the performance of assigned duties. This same right exists in respect of any member of personnel whose behaviour is incompatible with the discipline and good order required for operations on the rig – for instance, because they have contravened the drugs, alcohol or other prohibited substances policy. Where the person who has contravened the drugs, alcohol or other prohibited substances policy commits an infraction that causes harm or loss to occur, this would constitute grounds for inferring that his conduct was wilful.

Importantly, both parties have responsibility for ensuring that personnel who are mobilised for duties on the rig are medically – both physically and mentally – fit to undertake their duties. The contractor has the obligation to conduct medical examinations on them, ensuring that this is done by qualified medical personnel. If any specialised safety, survival or operational training courses are required, either by the governing jurisdiction or by petroleum industry practice, the contractor

also provides this to its personnel, while the operator ensures that *operator group personnel* have the requisite training prior to their mobilisation to the rig. The parties have responsibility for evacuating personnel who require medical treatment or emergency evacuation to a suitable hospital – in most cases by helicopter. In *Dusek v Stormharbour Securities LLP*,³¹⁸ the court held that employers owed personnel a duty of care to ensure that if evacuation was undertaken by helicopter, it is safe to do so and, if necessary, would need to conduct a risk assessment to determine this fact before allowing personnel to fly.

The above measures to ensure medical fitness need to be documented in a coherent policy that provides clear guidance to personnel of the conditions and circumstances in which they would be working. In *Palfrey v Ark Offshore Ltd*,³¹⁹ the court held that the defendant was in breach of its duty of care to ensure the safety of their employees by failing to put in place an effective policy for advising personnel of the risks of diseases in their area of operation of the rig. This was especially required when personnel were mobilised to overseas locations for work purposes.

The contractor is responsible for ensuring that personnel are provided with adequate catering, laundry and recreational facilities. This extends to ensuring that the catering personnel are also medically fit, and are subjected to medical tests at designated intervals. Given the sensitivity of food handling, preparation and service, the contractor is responsible for quality control in the entire food chain, ensuring that catering personnel comply with laid-down procedures on hygiene, clothing, mobilisation of foodstuffs, materials and consumables, storage and cleaning. Where the contractor fails in this duty and harm occurs to any personnel, the contractor may be liable in damages.³²⁰

³¹⁸ (2015) EWHC 37 (QB).

³¹⁹ (2001) All ER (D) 304 (Feb).

³²⁰ *Reynard v Exquisite Quisine Ltd (t/a Latours Cuisine)* 2006 S.C.L.R. 319 (OH).

2.4.1.5 Conduct of Drilling Operations

As stated previously in this section, drilling operations include all activities that the parties are required to undertake to drill and, if necessary, complete, sidetrack, suspend or abandon a well. The issue arises as to when drilling operations actually commence. This is because some joint operating agreements (JOAs), sale and purchase agreements (SPAs) and farm-out agreements contain provisions to the effect that drilling operations must commence by a given date as part of the conditions for the transaction. Different opinions have been expressed as to when drilling commences. While some commentators have stated that it commences when mobilisation of the drilling unit commences, others have stated that it occurs when the rig is pre-loaded or being prepared for drilling operations.³²¹ In *Vitol E & P Ltd v Africa Oil and Gas Corp*,³²² the court held that drilling operations commenced when ‘the drill penetrated the seabed’.³²³ This point, which is known as ‘spudding’, was the court’s preferred approach, its rationale being that this is the only conclusion that could be reached if the term ‘commencement of drilling’ was given its natural interpretation.³²⁴ The confusion in the different approaches to commencement of drilling operations is the reason why some contract parties prefer provisions that contain the term ‘commencement of *actual* drilling’ (emphasis added). This provision makes it clear that preparatory activities prior to actual drilling will not satisfy this term, as the piercing of the ground by the drill bits is indicative of actual drilling.³²⁵

Perhaps the contractor’s most crucial responsibility arising from the conduct of the drilling operations is the need to ensure that it is in accordance with the operator’s drilling programme.

³²¹ See, generally, Lowe, J. S. (1987) ‘Analyzing Oil and Gas Farmout Agreements’, *SW LJ*, 41, p. 759, at pp. 802 – 803.

³²² (2016) EWHC 1677 (Comm). See also *Vickers v Peaker* 227 Ark. 587, 300 S.W.2d 29 (1957).

³²³ *Ibid*, at para 61.

³²⁴ *Ibid*, at paras 38 and 61.

³²⁵ Lowe, J. S. (1987) ‘Analyzing Oil and Gas Farmout Agreements’, *supra*, at p. 803. See also I LAW OF FEDERAL OIL AND GAS LEASES § 14.05[2] (1986), which discusses the case law and federal regulations that interpret the term ‘actual drilling operations’.

Where a contractor has agreed to a drilling programme and fails to adhere to it, it may be in breach of the drilling contract, entitling the operator to recovery as prescribed in the contract. In *Lukoil Mid-East Ltd v Barclays Bank plc*,³²⁶ the court held that the operator was entitled to call on the bank guarantee that had been issued to guarantee the contractor's timely performance and adherence to the drilling programme.

This responsibility encapsulates the duty to comply with the instructions of the operator, particularly relating to the well-hole specifications and the course of the well. The operator would typically designate the well depth and other dimensions, and the contractor is expected to comply accordingly. To ensure that the well specifications are accurate, the contractor is responsible for measuring while drilling so that deviations can be observed in real time. The operator reserves the right to ask for a re-drill of the well at the contractor's cost if the deviation exceeds the tolerance limits.

Likewise, the contractor is responsible for complying with the mud, casing,³²⁷ coring³²⁸ and testing³²⁹ programmes instructed by the operator. Importantly, the contractor is responsible for ensuring that the drilling activities do not cause pollution, either from negligence or due to well conditions, and that, in line with existing laws, no unauthorised discharge into the sea is effected. If, in the course of undertaking the drilling programme, the rig or any of the *contractor group equipment* is wrecked or capsizes, the contractor is responsible for recovering and removing the debris so that no obstruction is caused to waterways.

³²⁶ (2016) EWHC 166 (TCC).

³²⁷ The obligation here is to drill the well to the depth, and set casing of the size and at the depths as specified in the drilling programme, and then test all strings of casing vide the methods and manner that the operator may instruct.

³²⁸ The obligation here is to core between the depths instructed by the operator, and thereafter deliver samples of all cores to a location designate by the operator for that purpose.

³²⁹ The obligation here is to perform drill stem, cased hole, open hole, or production tests or services instructed by the operator.

Following closely on the responsibility for adhering to the drilling programme is the contractor's responsibility to conduct the drilling operations in 'a good, diligent, safe and workmanlike manner'. The *workmanlike* standard of performance has been the subject of many judicial pronouncements, as the failure to meet this standard can create the basis for liability for the contractor. Initially, 'workmanlike manner' was thought to mean work that is undertaken in the traditional manner that contractors in the same community do.³³⁰ In the absence of generally accepted standards, the courts were willing to consider the practices of the community as binding standards on its members, such that any deviation was sanctioned. The community has traditionally been viewed as the purveyor of law and standards of behaviour. Indeed, it was the codification of such laws and practices that led to the emergence of the common law.³³¹

However, as society developed and there was more interaction between members of different communities, this standard progressively changed to meaning the degree of knowledge, efficiency and skill ordinarily possessed by people in the same trade or business as the contractor. In this regard, the focus was shifted from the manner of performance within a community to the expected standard of performance within the trade itself.³³² The standard became more objective and held contractors accountable for professional wrongdoing from which they would have been hitherto exculpated in their communities, even when they demonstrated that they had undertaken the task to the best of their ability, knowledge and skill.³³³ If the contractor demonstrated capacity

³³⁰ Metcalf, S. K. (2010) 'Contract: What Is "Performance in A Good and Workmanlike Manner"?', *MMMC*, Available: McDonald, McCann, Metcalf & Carwile, LLP; <http://mmmsk.com/contract-what-is-performance-in-a-good-and-workmanlike-manner/> accessed; 13 October 2017.

³³¹ On development of the common law, see Kiralfy, A. R., Lewis, A. D. E. and Glendon, M. A. (2017) 'Common Law', *ENCYCLOPEDIA BRITANNICA* Available: Encyclopædia Britannica, inc; <https://www.britannica.com/topic/common-law>; accessed 18 January 2018.

³³² See, for instance, Kincaid, M. L. (1989) 'Recognizing an Implied Warranty That Professional Services Will Be Performed in a Good and Workmanlike Manner', *Mary's LJ*, 21, p. 685, at p. 701.

³³³ Thomsen, C., Darrington, J., Dunne, D. and Lichtig, W. (2009) 'Managing Integrated Project Delivery', *Construction Management Association of America (CMAA)*, McLean, VA, 105, at p.12.

that was below that ordinarily expected of a practitioner within that trade, or the task fell short of the standard within the trade, the contractor was liable for the ensuing wrong.

This approach has been approved judicially. In *Hancock v BW Brazier (Anerley) Ltd*,³³⁴ Lord Diplock stated that the expression ‘workmanlike manner’ meant that the task shall be undertaken ‘with due skill, care and judgment’. This ratio was followed in *Harrison v Shepherd Homes Ltd*,³³⁵ in which the court held that the expression meant that the task would be undertaken with ‘proper skill and care’.³³⁶ Where the contractor fails to reach this standard, this may give rise to liability for damages at the instance of the operator. For instance, in *E.B Duncan Drilling & Well Servicing Co. v. Robinson Research, Inc.*,³³⁷ the court held that a drilling contractor that failed to bring a wild well under control because it did not have the requisite equipment, which had been specified by contract, had not acted in a workmanlike manner, and was solely responsible for the blowout that ensued.

The courts have also drawn a distinction between drilling practices and standards that require the contractor to perform in a ‘workmanlike manner’ and those that require them to act with ‘due diligence’. In *Matador Drilling Co. v. Post*,³³⁸ it was held that while ‘workmanlike manner’ was indicative of *how* the work was done, ‘*due diligence*’ focused on *when* the work is done. The rationale for this distinction was based on the court’s thinking that the operator would be without protection and recourse if the contractor undertook the drilling operations with skill and care, but wasted a lot of time in doing so. In circumstances in which compensation to the contractor was based on daily rates, it provided a perverse incentive for a contractor to drag out the work in order to get more pay.

³³⁴ (1966) 1 W.L.R. 1317.

³³⁵ (2011) EWHC 1811 (TCC).

³³⁶ *Ibid*, at paras 39-43 and 165.

³³⁷ 147 So. 2d 95 (La. Ct. App. 1962).

³³⁸ 662 F.2d 1190 (5th Cir. 1981).

It is noteworthy that the contractor is not the only entity under the obligation to perform its tasks in a ‘workmanlike manner’. Most JOAs typically impose the same duty on the operator in the discharge of their operatorship obligations,³³⁹ and this is owed to the non-operators rather than the contractor. Although a full discourse on the nature of this obligation is outside the scope of this study, suffice it to mention that the applicable standard to determine whether the operator has fulfilled this obligation is that in accordance with ‘good oilfield practice’, which is defined as the application of customary oilfield practices with the prudence and diligence ordinarily expected of experienced operators engaged in similar activities.³⁴⁰ A similar requirement is often found in drilling contracts. What is ‘prudent’ and ‘diligent’ is circumstantial and dependent on the state of technology at the specific time under consideration.³⁴¹

To demonstrate that drilling operations are being conducted in accordance with the operator-approved drilling programme, the contractor has responsibility for providing to the operator daily drilling reports in an approved format. This report will contain the details of daily activities on the rig, including the tests and repairs undertaken, as well as itemisation of the applicable rates to the nearest half hour, which would be indicative of the compensation payable by the operator. This report is expected to be complete and accurate, and will serve as the primary document for determining whether the contractor’s charge for any day is justified, taking into consideration the alignment between the charge and the actual activity undertaken.

2.4.2 Regulatory Regime and Compliance Requirements

³³⁹ See, for instance, 6.2.2, 2009 UK Industry Model Form Joint Operating Agreement, published by Oil & Gas UK, and available at <https://oilandgasuk.co.uk/oil-gas-uk-presents-suite-of-model-agreements-to-improve-industry-efficiency/>; accessed 19 January 2018.

³⁴⁰ *Ibid*, at clause 1.1.

³⁴¹ Styles, S. (2007) ‘Joint Operating Agreements’, in Gordon, G., Paterson, J. & Usenmez, E. (eds) *Oil and Gas Law: Current Practice and Emerging Trends*. Dundee: Dundee University Press, pp. 359–409, at p. 377.

The scale and potential effect of the drilling operations have necessitated government intervention that regulates various aspects of the drilling operations, requiring the parties to conduct them in a manner that complies with the relevant laws and regulations. Indeed, post-Macondo, governments have increased the oversight of the drilling industry, introducing new measures that ensure that drilling operations are carried on safely and responsibly.

In this regard, the operator and contractor have the overarching responsibility for complying with the law, and procuring the compliance of members of their respective *groups*. Both parties need to comply with all laws and regulations relating to certification of equipment and authorisation of their respective personnel to work within the jurisdiction of the well location. The latter would include ensuring that all laws relating to insurance and work permits are fully complied with. Where either party fails to comply with the general requirements of the law, in consequence of which fines or penalties are imposed, the errant party will be solely responsible for this, except where the contract states otherwise. The most relevant compliance requirements specifically related to drilling operations are discussed hereunder.

2.4.2.1 Licences and Authorisations

The operator is responsible for obtaining all the necessary licences and approvals required for the drilling operations to be legitimately undertaken at the well location. The operator is also responsible for advising the contractor of any conditions, limitations or restrictions in any licences or authorisations that will limit the right of access and egress from the well location, as well as the conduct of the drilling operations.

The operator shall be responsible for the consequences of any failure to obtain any licence or authorisation in a timely manner which causes delays in the drilling operations, or limits the right of access and egress from the well location. If the operator agrees with the government to vary

the terms of the petroleum authorisation,³⁴² in consequence of which delays to the drilling programme occur, the operator will be responsible accordingly.

The contractor also has responsibility for securing permission for the drilling unit to be utilised in the geographical jurisdiction of the area of operations. Where the drilling unit is to be mobilised from one country to another, this would require obtaining an import licence that details the conditions precedent to the utilisation of the rig in the country of operations. If the contractor fails to obtain the import licence or contravenes any of the conditions precedent to its usage in the location of operations, the contractor would bear this responsibility, except where the contract states otherwise.

2.4.2.2 Compliance with Health, Safety and Environmental Regulations

In the conduct of drilling operations, the operator and contractor are expected to protect the environment by acting to preserve air and water quality, to shield human, animal and plant life from harmful effects of the drilling activities, and to mitigate any nuisance potentially arising therefrom. In this regard, the operator and contractor are mandated to comply with extant laws and regulations relating to environmental damage arising from the drilling operations, and any environmental requirements that specifically apply to the area of operations. In the UK, the Environment Agency is the government entity responsible for issuing the relevant permits, and would typically conduct a risk assessment prior to issuing the relevant permits.³⁴³

Although the primary responsibility for ensuring compliance with environmental laws and regulations is given to the operator *vide* the licence for the drilling operations issued by the

³⁴² See, for instance, *Dean v Secretary of State for Business, Energy and Industrial Strategy* (2017) EWHC 1998 (Admin); (2017) 4 W.L.R. 158, in which the court held that the terms of a petroleum authorisation could be varied by the Secretary of State for Business Energy and Industrial Strategy.

³⁴³ See <https://www.gov.uk/government/organisations/environment-agency>; accessed 14 October 2017.

appropriate authority, the operator usually allocates such responsibility to the contractor and *contractor group personnel* in the drilling contract. The operator requires the contractor to maintain an environmental management system (EMS) that contains its health, safety and environment (HSE) policy, as well as details of its plan to comply with the applicable environmental laws that regulate drilling operations. The EMS will also contain information on the plan for training *contractor group personnel* to provide awareness training required for the applicable compliance requirements for the drilling operations. In essence, the EMS has to demonstrate the contractor's plan to ensure adherence to the highest standards of environmental protection and remediation, if required.

The operator is responsible for conducting independent audits of the EMS to ascertain the level of compliance with extant laws and regulations. This is notwithstanding the duty of the Environment Agency to conduct its own independent audits on organisations engaged in exploration in the North Sea, based on some specific parameters.³⁴⁴ In the USA, in the aftermath of the Macondo disaster, the government accepted a proposal that sought to tighten the regulation of certain specific operational requirements which directly impacted well control.³⁴⁵ In addition, the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) proposed additional regulation of operators' safety and environmental management system (SEMS) that authorise impromptu rig inspections and mandated independent audits of SEMS programmes.³⁴⁶ BOEMRE was subsequently split into the Bureau of Ocean Energy Management (BOEM) and

³⁴⁴ These parameters include oil-in-produced water mass; oil spill volume rate; CO₂ emissions; greenhouse gas emission rate, and operations waste recycling/reuse.

³⁴⁵ The operational requirements include rig audits, acoustically controlled subsea BOP systems, kick detection and response procedures, shear ram design, pressure testing, redundant BOPs, and also prescribed minimum standards for well control training – See the Report to the President by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling that was released on September 14, 2011. The report can be accessed here: <https://cybercemetery.unt.edu/archive/oilspill/20121210172821/http://www.oilspillcommission.gov/>

³⁴⁶ See, generally, <https://www.bsee.gov/>; accessed 15 October 2017.

the Bureau of Safety and Environmental Enforcement (BSEE), with BSEE now vested with the authority to monitor SEMS programs³⁴⁷.

2.4.2.3 Customs Duties, Fees and Taxes

Another compliance requirement is in respect of the payment of customs or excise duties, taxes and fees. Responsibility for this compliance requirement is shared between the operator and contractor. For instance, while the contractor is responsible for the import and export of the rig and its equipment and spares where applicable, the operator is responsible for the customs and excise duties, fees and taxes payable thereon. However, the operator's responsibility does not extend to the excise duties, fees and taxes payable on *contractor group equipment* during drilling operations. Both parties are responsible for duties, fees and taxes payable on their respective equipment as well as on the personal property of the personnel in their respective groups.

With respect to income accruing from the performance of the drilling contract, the contractor is responsible for reporting, filing and remitting all applicable taxes, as well as all fines, penalties and interest that may be assessed on the income, profits and gains arising therefrom. The contractor is also to ensure that subcontractors and other members of *contractor group* report, file and remit all applicable taxes. Responsibility for members of *operator group* lies with the operator, and both parties typically absolve each other from any liability arising from tax-related default except as stated in the drilling contract. This absolution from liability would also extend to any salaries, wages, or income, remuneration, emoluments, social security payments or deemed benefits paid to any member of the *operator group personnel* or *contractor group personnel* respectively.

³⁴⁷ See <http://gomr.mms.gov/>; accessed 15 October 2017.

The above notwithstanding, the operator has responsibility for deducting and remitting withholding tax (WHT) from payments due to the contractor in line with the applicable law. Where applicable, the operator also deducts and remits value added tax (VAT) from relevant payments due to the contractor, and in both cases, provides evidence of remittance to the latter to enable them to claim the WHT credit to net off their corporate income tax liability.

Importantly, the operator has the responsibility of reimbursing the contractor for any increase in the tax, fees or levies arising from a change in the laws within the jurisdiction of operations during the firm term of the drilling contract if the parties have so agreed.

2.4.2.4 Reporting and Compliance Monitoring

The authorisation to drill given by the government to the operator imposes the responsibility for making formal reports in a prescribed manner upon the occurrence of certain events. For instance, if death or personal injury occurs during the drilling operations, the operator is supposed to notify the relevant government agency which would take whatever steps are required, either to cause an investigation into the incident with a view to preventing a re-occurrence, or to impose sanctions as appropriate.

The operator delegates this responsibility for making formal reports to the contractor as the entity in control of the actual drilling operations. Thus, the contractor is mandated by the drilling contract to notify the operator of any accidents or incidents resulting in personal injury to or the death of any person or damage to any property arising out of or in consequence of the drilling operations. In addition to taking all necessary remedial actions regarding any such accident or incident, the contractor is responsible for preparing the requisite reports as dictated by extant law or as directed by the operator.

This delegation of authority by operator to contractor might impede drilling operations if there is a communication gap in the expectations of both parties. Where, for instance, there is no clarity as to the division of the responsibilities for preparing and filing requisite reports or approval requests with the relevant government agency, tasks remain undone, and this may impact on drilling operations negatively.³⁴⁸

If significant spillage of lubricants, fuel, chemicals or other consumables³⁴⁹ occurs during drilling operations, the contractor is responsible to ensure that this is immediately reported to the operator, and the latter is expected to notify the relevant government authorities. The same responsibility exists in respect of major outbreak of diseases within the drilling unit. The operator is then responsible for informing the relevant health authorities, who may elect to undertake an occupational health audit to review the contractor's compliance with the hygiene standards, quality control and mobilisation protocols for foodstuffs, consumables and other relevant materials.

The contractor is expected to undertake scheduled training of the *contractor group personnel*, especially as it relates to survival within the specific area of operations. Such training will include BOSIET,³⁵⁰ HUET³⁵¹ and MIST,³⁵² and evidence of their delivery will be given to the operator, who is responsible for reporting same to the relevant government authorities.

³⁴⁸ See, for instance, Whitfield, S. (2017) *Macondo Contractor/Operator Gaps Identified by CSB*. Oil and Gas Facilities Newsletter. USA: Society of Petroleum Engineers. Available at: <https://www.spe.org/en/ogf/ogf-article-detail/?art=2637>; accessed: 31 October 2017, where the issue was the policies on conducting negative pressure tests on the Macondo well. While Transocean averred that BP was responsible for the development and obtaining approval of plans from the Mineral Management Service of the US Department of Interior, BP stated that Transocean had this responsibility.

³⁴⁹ What constitutes significant spillage will be defined in the contractor's EMS.

³⁵⁰ Basic offshore safety induction and emergency training which equips personnel with knowledge of basic emergency response and skills for travelling to and from offshore installations by helicopter, as well as specific safety issues and regimes relevant to offshore installations.

³⁵¹ Helicopter underwater escape training which arms personnel with skills for emergency exit in the event of a crash landing over water.

³⁵² Minimum Industry Standard Training, relevant for people who are new to the offshore area of operations.

2.4.3 *Third-Party Services, Rights and Benefits*

For the purposes of this section, there are three classes of third parties. The first is constituted by people who claim that a certain benefit or right has been conferred upon them by a term in a contract, which entitles them to legal protection and enforcement of that benefit or right. In the UK, they are afforded statutory recognition under the Contracts (Rights of Third Parties) Act 1999; even though the protection is limited by qualifications that impact on the real effect of the reprieve supposedly granted. This class of people will be discussed in a separate section in this study.³⁵³

The second class is made up of people who are negatively impacted by the operations of contracting parties that cause death, injury or other damage to them, their property or their relatives (in case of death). Protection of these third-party interests is founded on the law of tort and is justified by the duty of care that is owed to persons who are close enough to the contract activity *locus* as to be impacted by it. The responsibility of the contract parties to this class of people is discussed as being grounded in the law of torts,³⁵⁴ which would also be the basis for imposing liability when culpability is established.

The third class of third parties is constituted by entities who are members of the *operator group* (other than the operator) or *contractor group* (other than the contractor). This class would ordinarily be covered by the definition of *group* for both operator and contractor, and so should not be considered as third parties properly so called but, for the purposes of this section, fall into this enlarged categorisation of people who are owed specific responsibilities by the operator and contractor arising from the activities under the drilling contract. These responsibilities are discussed below.

³⁵³ Under the section on Contracts (Rights of Third Parties) Act 1999.

³⁵⁴ Under the bedrock section in Chapter 3.

2.4.3.1 Contracts (Rights of Third Parties) Act 1999

Under this Act, the operator and contractor can confer a benefit expressly stated as being enforceable by the third party,³⁵⁵ or the term of the contract can *purport to confer* a benefit on the third party,³⁵⁶ which the third party is – or is presumed to be – able to enforce if there is nothing in the contract that rebuts that presumption.³⁵⁷ The aim of this legislation is not to abolish the privity of contract principle, but to reform it by creating a statutory exception, essentially allowing third parties enforceable rights under contracts,³⁵⁸ by stipulating circumstances in which the third party is legally able to sue the promisor and enforce the promise contained in the contract conferring a benefit to him. This legislation is discussed in detail in this study.

Most drilling contracts generally rebut that presumption, and expressly provide that no provision of the contract shall, pursuant to the Act, confer any benefit on, or be enforceable by, any person who is not a contract party. The Act allows contract parties to contract out of the effects of its provisions,³⁵⁹ and most drilling contracts exercise this discretion accordingly. However, drilling contracts could also allow partial compliance, by restricting the application of the Act only to certain provisions of the contract.³⁶⁰ Thus, the drilling contract can prescribe that the provisions relating to indemnities, consequential losses, insurance, intellectual property rights and patent infringement should be subject to the Act.

Perhaps the most critical class of people impacted by the restricted application of the Act to third parties are those in the third class of third parties, which is constituted by entities who are members of the *operator group* (other than the operator) or *contractor group* (other than the

³⁵⁵ Section 1(1)(a), Contracts (Rights of Third Parties) Act 1999.

³⁵⁶ *Ibid.*, s. 1(1)(b).

³⁵⁷ *Ibid.*, s. 1(2).

³⁵⁸ Yeo, T. (2001) 'When Do Third Party Rights Arise Under the Contracts (Rights of Third Parties) Act 1999 (UK)?', *Singapore Academy of Law Journal*, 13, p. 34, at p. 36.

³⁵⁹ *Op.Cit.*, s. 1(2).

³⁶⁰ *Ibid.*, s. 1(4).

contractor). This class can be further sub-divided into non-operators and other contractors or subcontractors. Within this categorisation, the responsibility owed to non-operators – also known as co-venturers – by the operator and contractor is particularly instructive and is discussed hereunder.

The drilling contract is ordinarily between the operator and the contractor. Sometimes, the operator contracts on behalf of itself alone or on behalf of itself and the non-operators. The responsibility of the non-operators to the operator with respect to any liability resulting from the operator's performance of its functions will depend on the law of agency as well as the terms of the joint operating agreement (JOA) – the document that regulates and defines their relationship *inter se*. Typically, the JOA would provide that all rights and liabilities arising under the petroleum authorisation granted are to be borne in proportion to the respective percentage interests held by the co-venturers.³⁶¹

If the JOA mandates the operator to contract for itself *and* as agent for the non-operators, the operator does this *qua* agent, and the non-operators are disclosed principals. Indeed, the 2009 Model JOA³⁶² prescribes that all contracts made on behalf of the non-operators by the operator should disclose the existence of the non-operators.³⁶³ By the rules of agency, whatever liability is incurred by the operator is done as agent of the non-operators, meaning that all the non-operators are also liable for the ensuing loss.³⁶⁴ In this regard, the non-operators have an interest in knowing whether they can sue and be sued on a contract in respect of liabilities arising therefrom during the pendency of the operator acting as their agent. Thus, they may require

³⁶¹ Black, A. J. and Dundas, H. R. (1992) 'Joint Operating Agreements: An International Comparison from Petroleum Law', *J. Nat. Resources & Envtl. L.*, 8, pp. 49–79, at p. 63.

³⁶² Developed by Oil & Gas UK in February 2009: <https://oilandgasuk.co.uk/oil-gas-uk-presents-suite-of-model-agreements-to-improve-industry-efficiency/>; accessed 16 June 2018.

³⁶³ Clause 6.5.8.

³⁶⁴ Gounari, Z. (2002) 'Duties and Liabilities of the Operator under UK Oil and Gas Joint Operating Agreements: Is the Operator a Fiduciary?', *Oil, Gas & Energy Law Journal (OGEL) Archive Issue*, at p. 8.

express clarification and confirmation of the operator's status both in the JOA and the drilling contract.

Where the JOA mandates the operator to contract for itself *and* as agent of the non-operators, the operator contracts in a dual capacity – *qua* agent and *qua* principal. This study posits that the practical effect of contracting either solely *qua* agent and in a dual capacity – *qua* agent and *qua* principal – is the same. In both cases, the operator and the non-operator will be liable for all losses in line with their JOA, making it a moot point as to whether the operator contracts either solely *qua* agent or in a dual capacity.³⁶⁵

From the contractor's perspective, the operator's status as agent of the disclosed principals, the non-operators, means that the contractor can elect to sue any or all of them for any ensuing liability, as the operator will be deemed as acting based on the express or ostensible authority of the non-operators.³⁶⁶ To prevent this possibility contractually, the drilling contract would typically provide that the contractor shall look only to the operator for the due performance of the contract and is not entitled to commence any proceedings against any non-operator or principal other than the operator. This contractual provision remains effective even where there is a dispute between the JOA co-venturers.³⁶⁷ The contractor will sue the operator as normal, and the operator will use the cash call mechanism under the JOA to request the contributions of the non-operators in line with their percentage interest, to satisfy the liability, the dispute between the principals notwithstanding.

³⁶⁵ See, for instance, *Domsalla (t/a Domsalla Building Services) v Dyason* (2007) EWHC 1174 (TCC); (2007) B.L.R. 348, paras 63–70, in which the court held that the respondent was liable as principal and as agent, given the fact that the principals were disclosed, and the parties intended liability to attach as such.

³⁶⁶ See generally, Stone, R. (1996) *Law of Agency*. London: Cavendish, at p. 98.

³⁶⁷ See, for instance, *Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd, YFP Deepwater Co Ltd, EER (Colobus) Nigeria Ltd, Newage Exploration Nigeria Ltd, PR Oil & Gas Nigeria Ltd*. (2017) EWCA Civ 1525, in which the joint venture partners were in dispute over the approval of the development of two oil wells.

Likewise, the drilling contract would also empower the operator to act on behalf of the non-operators and for itself, with respect to bringing actions against the contractor to enforce any obligation or liability. Where the contract parties agree to this provision, this would be enforced under the Act, as the parties' intention is paramount in this regard.³⁶⁸

The question then arises as to whether the non-operators and the contractor, who are restricted from direct enforcement of the contract *inter se* – by the drilling contract, and under the Act, reflecting the intention of the parties – can circumvent the restrictions placed on them thereto. In other words, what is the effectiveness of the way in which risk has been allocated by the primary contracting parties – the operator and contractor – against the backdrop of these restrictions? This inevitably leads to the question of what responsibility the contractor and operator owe the non-operators if the contractor has been negligent as a result of which loss has occurred, and the operator is either unwilling or unable to bring an action to recover against the contractor because of the indemnity, liability and exclusion clauses in the drilling contract. Again, the contractor may be trying to recoup expenses from the operator in circumstances in which the non-operators may be called upon to contribute.

This question requires an examination of the relationship between the non-operator and the contractor other than in contract or under the Act. Thus, this relationship would be examined in *tort* and in *agency*.

When an entity undertakes a task for another entity pursuant to a voluntary or contractual relationship, then, irrespective of the nomenclature of this relationship – contractual, special or non-contractual – liability will attach, by reference to either the contract terms or the general principles of negligence, or under the principle of voluntary assumption of responsibility.

³⁶⁸ MacMillan, C. (2000), *supra*, at pp. 723, 734.

Furthermore, a voluntary task performed by one entity for another may give rise to concurrent liability in contract and tort. If the courts were to find that a ‘contract’ nevertheless exists, the absence of consideration notwithstanding,³⁶⁹ the mere fact that those two entities have a ‘contractual’ relationship does not preclude the existence of a duty of care in tort, especially if *assumption of responsibility* can be established against one of the ‘parties’.³⁷⁰ This subject is examined in detail in subsequent sections.

The fact that the non-operators are disclosed principals means that they can sue or be sued on the contract, subject to the restriction imposed by the contract, and supported by the JOA already discussed. This also means that concurrent liability can attach in tort if the existence of a duty of care can be established. This duty of care can either be directly between the non-operator/principal and the contractor, or between the operator/agent and the contractor.³⁷¹ The fact that the contractor can sue any or all the disclosed principals means that they are *proximate* enough for a duty of care to exist, which in turn gives rise to a basis for an action in tort *inter se*.³⁷² Thus, this study posits that the non-operator can ordinarily proceed against the contractor in tort, and *vice versa*. This is especially true when the contractor’s activities under the drilling contract have harmed the interest of the non-operators in circumstances which, but for the indemnity and liability structure in the drilling contract, would have given rise to liability on the part of the contractor.

Again, under the principles of *agency*, he who does something through another, does it himself. There is no disputing the fact that where the principals are disclosed, the operator also contracts *qua* agent, meaning that the non-operator/principal may be vicariously liable for the acts of the

³⁶⁹ As happened in *De La Bere v Pearson* (1908) 1 KB 280.

³⁷⁰ Mulheron, R. (2016) *Principles of Tort Law*. Cambridge University Press, at p. 18. This is however subject to any expressed intent of the contract parties to exclude or limit liability in tort: *Biffa Waste Services Ltd and Another v Maschinenfabrik Ernst Hese GmbH and others* (2008) EWHC 6 (TCC) 169(4).

³⁷¹ Stone, R. (1996) *Law of Agency*, *supra*, at p. 116.

³⁷² See, generally, *Hedley Byrne v Heller & Partners Ltd* (1964) AC 465, at 528–529, per Lord Devlin.

operator/agent. Since the non-operators would have themselves been liable for any ensuing harm, undertaking the task through the operator does not alter their liability position, both by the doctrines of *agency*³⁷³ and *vicarious liability*. Furthermore, the non-operators may also be simultaneously directly liable to the contractor if the task performed by members of the *operator group personnel*, and the resulting harm, are underpinned by a non-delegable duty of care owed to the contractor.³⁷⁴ For instance, if the negligent activities of a member of the *operator group personnel* were exacerbated by the operator's failure to provide adequate materials³⁷⁵ and competent staff,³⁷⁶ ensure a proper work system and effective supervision,³⁷⁷ and a safe work environment,³⁷⁸ then this can be imputed directly to the non-operators, entitling the contractor to proceed against them directly in *agency*.

The above notwithstanding, whether the non-operators and the contractor are able, in fact, to proceed directly against each other in tort or agency, given the restriction in the drilling contract and the JOA, can be argued from the different perspectives presented below.

Drilling Contract Restriction Applies

The drilling contract would typically exclude liability notwithstanding the sole, contributory, gross, active or passive negligence of any party, or members of their *group*, or any breach of contract, tort, duty (statutory or otherwise, whether or not involving fault), or any under any other legal theory (including strict or product liability) that may be applicable. This exclusion purports to deny any other course of action from being undertaken in respect of activities arising from the drilling contract. Indeed, it is on this basis that insurance companies are unable to

³⁷³ *Qui facit per alium facit per se*.

³⁷⁴ Mulheron, R. (2016) *Principles of Tort Law*, *supra*, at pp. 969–970. See also *Majrowski v Guy's and St. Thomas's NHS Trust* (2006) UKHL 34, per Lord Nichols.

³⁷⁵ *Parkinson v Lyle Shipping Co. Ltd* (1964) 2 Lloyd's Rep. 79.

³⁷⁶ *Hudson v Ridge Manufacturing Co Ltd* (1957) 2 QB 348.

³⁷⁷ *General Cleaning Contractors Ltd v Christmas* (1953) AC 180, at 194.

³⁷⁸ *Latimer v AEC Ltd* (1953) AC 634; *Wilson v Tyneside Window Cleaning Co* (1958) 2 QB 110.

proceed against parties whose actions have caused the harm that triggered the indemnification by the indemnitor and payment by the insurance companies. Once the contract parties have a *waiver of subrogation* clause³⁷⁹ in the contract, this effectively prevents the insurance company from any further recovery. In *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*,³⁸⁰ the Supreme Court refused to allow an insurance company to recover money from a tortfeasor whose negligent action had caused the sinking of a barge. The court's rationale was that the *waiver of subrogation* clause effectively extinguished all rights of action against a tortfeasor who was the target of the clause. The fact that the tortfeasor was not a party to the insurance contract was not a bar to the operation of the *waiver of subrogation* clause and that, in these circumstances, the doctrine of privity of contract would be relaxed. The court was convinced that relaxing the operation of the doctrine to give effect to the *waiver of subrogation* clause was in consonance with the commercial reality of the relationship of the parties, and 'was a permissible incremental change in the common law needed to address enduring needs and values in society'.³⁸¹

By that decision, the court upheld the primary contract between the contract parties, and refused to recognise any other route as being accessible to defeat the intention of the parties as espoused in the contract. If the drilling contract is seen as superseding other legal routes available – in tort and agency – the same outcome as the court in *Fraser River Pile* may prevent the non-operators and/or contractors from any recourse other than as stated in the drilling contract, thereby preserving the indemnity, exclusion and liability structure agreed between the operator and the contractor.

³⁷⁹ The *waiver of subrogation* is an exclusion clause which extinguishes the right to subrogate. This is the right that an insurer possesses to proceed against a third party whose actions caused an insurance loss to the indemnitor, with a view to recovering the amount paid by the insurer to the insured for the loss; see *Morris v Ford Motor Co* (1973) QB 792.

³⁸⁰ (2000) 1 Lloyd's Rep. 199.

³⁸¹ *Ibid*, at paras 39 and 40. See also *London Drugs Ltd v Kuehne & Nagle International Ltd* (1992) 3 S.C.R. 299.

This view is supported by the decision of the court in *Natol Petroleum Corp v Aetna Insurance Co*³⁸² in which the court had to decide whether an insurance contract to which the parties to a drilling contract had looked for the value of equipment that was lost in hole, covered liability assumed by ‘contract’, or only liability ‘imposed by law’. It was common ground that the operator’s liability for the lost-in-hole equipment was assumed under the drilling contract, and that the loss was not occasioned by negligence, neither could liability be founded in any other tort. The court held that the operator’s liability assumed by contract was not covered by the insurance contract, and their rationale was that the assumption of liability under the terms of a contract – which was enforceable in accordance with contract law – is distinct from liability ‘imposed by law’ - such as tort law - *in the absence of a contract* (emphasis added).³⁸³ This rationale clearly shows that the court accorded priority to the intention of the parties as expressed in contract, and refused to countenance any other legal theory or route as superseding the contract.

Drilling Contract Restriction Does Not Apply

Where the existence and identity of the non-operators as the principal(s) of the operator-agent are disclosed, according to the general principles of agency, the non-operators can ordinarily sue and be sued by the contractor.³⁸⁴ Even where the principal(s) are undisclosed, they can still sue on the contract entered by their agent, provided that the fact of their existence was made to known to the contractor, even though the actual identity was not disclosed.³⁸⁵ Although agency relationships are mostly based on contracts, some writers situate the law of *agency* as being *sui generis* within the body of commercial law.³⁸⁶ Indeed, while labelling *agency* as a ‘power-

³⁸² 466 F.2d 38 (10th Cir. 1972).

³⁸³ *Ibid*, at p.42.

³⁸⁴ Styles, S. (2007) ‘Joint Operating Agreements’, *supra*, at pp.384–383.

³⁸⁵ Reynolds, F. (2016) *Unidentified Principals in Common Law*. in ‘Agency Law in Commercial Practice’, Danny Busch, Laura Macgregor, Peter Watts (eds) Oxford: Oxford University Press, p. 55–94, at p. 57.

³⁸⁶ Sealy, L. S. (1999) *Commercial Law: Text, Cases and Materials*. 2nd ed. London; Butterworths, at p. 6.

liability' relationship,³⁸⁷ one writer makes the point that special relationships such as this should not be constrained by the narrow compartmentalisation of the law, stating that *elegantia juris* can be achieved only if the law is approached dynamically rather than being placed in a strait jacket.³⁸⁸

It is, perhaps, in line with this thinking that the courts sometimes engage in judicial activism in their quest to do substantive justice when confronted with cases the outcomes of which would not accord with this quest if they were to be decided on extant legal principles. For instance, and as discussed below,³⁸⁹ as it related to the doctrine of *common employment*, the courts' attitude was to keep curtailing its scope of application, and conversely, keep enlarging the scope of recovery for claimants harshly affected by its strict application.³⁹⁰

One way in which the courts have demonstrated their willingness to do substantive justice is by resort to the equitable remedy of *constructive trust* to prevent wrongdoing. An example of such resort is seen in *International Corona Resources Ltd v Lac Minerals*,³⁹¹ in which the court deemed a constructive trust to be in existence to prevent unjust enrichment. It reached this decision after evaluating other remedies such as 'restitution', 'damages', and 'account for profits', which it found did not address the justice of the case. Restitution could not be ordered as the property in question could not be 'given back' to the claimants, as they never owned it in the first instance; damages were inappropriate because a one-off payment would deny the claimant the benefit of the fruits of their proprietary information on a continuing basis; and

³⁸⁷ A relationship in which one party is vested with the power to alter the legal relations of another, and the latter accepts the liability of having his legal relations altered.

³⁸⁸ Dowrick, F. E. (1954) 'The Relationship of Principal and Agent', *The Modern Law Review*, 17(1), pp. 24–40, at pp. 36–38.

³⁸⁹ Under the heading: 'Liability for Death, Injury and Loss/Damage'.

³⁹⁰ *Smith v Charles Baker & Sons* (1891) AC 325.

³⁹¹ (1989) 2 S.C.R. 574.

account for profits would not address the proceeds from the use of the confidential proprietary information on an on-going basis.³⁹²

Similarly, prior to the enactment of the Contracts (Rights of Third Parties) Act 1999, the courts would use the instrumentality of *constructive trust* to provide equitable relief for a third-party beneficiary to take the benefit conferred under a contract.³⁹³ Ordinarily, the principle of privity would have prevented this legal route from being available. However, the courts resorted to this in deserving circumstances to prevent unjust enrichment. Even with the enactment of this Act, contract parties are at liberty to exclude its application to their transaction, either wholly or partially. It is submitted that the courts are still able to resort to the mechanism of constructive trust, as the inherent jurisdiction of the court to do substantive justice has been neither diminished nor fettered.³⁹⁴

Flowing from the above, it is plausible that, in deserving circumstances, the courts can allow a direct action between the non-operator and the contractor despite the restriction in the drilling contract – for instance, if the contractor makes available confidential information to the operator, who then discloses same to the non-operators *qua* co-venturers, but then a non-operator uses or distributes that information in an unauthorised manner, to the contractor's detriment. In this circumstance, the contractor cannot proceed against the operator who has done nothing wrong; the drilling contract would typically permit the sharing of information with co-venturers.³⁹⁵ If the operator has informed the non-operator of the confidential and proprietary nature of the

³⁹² See also *Minera Aquiline Argentina v IMA Exploration* (2006) BCSC 1102.

³⁹³ Merkin, R. (ed.) (2000) *Privity of Contract: The Impact of the Contracts (Right of Third Parties) Act 1999*. 1st ed Oxford: Informa Law from Routledge, at pp. 18–24.

³⁹⁴ *Halsbury's Laws of England*, 4th ed. (London: LexisNexis UK, 1973), vol. 37, at para. 14: 'the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them'.

³⁹⁵ See, for instance, Art 21.4, Mobile Drilling Rigs Contract, Edition 1.

information, but the latter nevertheless uses or distributes it in an unauthorised manner to the contractor's detriment, this study posits that the contractor can proceed against the non-operator for breach of their common law duty of confidence, provided that the ingredients³⁹⁶ for establishing liability have been satisfied.

Although the contractor did not communicate this information directly to the non-operator, the latter may nonetheless be liable to the former. This is because some drilling contracts have provisions to the effect that if information that is otherwise confidential, is disclosed by a third party who is in possession of same lawfully, 'who is under *no* obligation not to disclose'³⁹⁷ (emphasis added), then no liability attaches. By parity of reasoning, where the third party is under an obligation not to disclose, as in the present scenario in which the operator informs the non-operator of the confidential nature of the information, together with the request not to disclose, if the latter goes ahead to disclose unauthorisedly, that non-operator may be liable to the contractor if the latter suffers loss thereby.

The above notwithstanding, this study further posits that the possibility of direct action between the non-operator and the contractor presents the potential problem of circularity due to the indemnity structure of the drilling contract. For instance, if the non-operator successfully sues the contractor for negligence and recovers damages thereby, the contractor can claim indemnity from the operator if the drilling contract allows indemnification in that circumstance. For the operator to meet the indemnity obligation, it may either call on the insurers to settle the claim or issue a cash call on the non-operators under the JOA. In both scenarios, the responsibility for bearing the economic consequences of the indemnity is ultimately borne by the co-venturers,

³⁹⁶ See *Coco v A N Clark (Engineers) Ltd* (1969) RPC 41, at 47–48 per Megarry J. The tests are as follows: (a) the information must possess the necessary quality of confidence; (b) it is communicated in circumstances importing an obligation of confidence; and (c) the information has been used in an unauthorised manner, to owner's detriment.

³⁹⁷ See, for instance, Art 21.2(c), Mobile Drilling Rigs Contract, Edition 1.

including the non-operator who recovered the damages from the contractor. To avoid this circularity, most JOAs provide that proceedings can be commenced only by the operator. Thus, even in circumstances in which the non-operator has a cause of action against the drilling contractor, the non-operator is unable to proceed, and it is doubtful that the operator would proceed against the drilling contractor in circumstances which would create this circularity because of the indemnity structure of the drilling contract.

2.4.3.2 Intellectual Property Rights and Patents Infringement

The operator and contractor share the responsibility for ensuring that there is no infringement of any patent, proprietary or protected right belonging to any entity during the drilling operations. In this regard, both parties are responsible to ensure that any patent, copyright, proprietary right or confidential know-how, trademark or process provided by the other party is not infringed or misused, as the intellectual property rights in them remain with the party who has provided them accordingly.³⁹⁸

Furthermore, the operator is responsible for ensuring that none of the technical information, instructions, materials or equipment that it issues to the contractor infringes any known patent, proprietary or protected right. Likewise, the contractor assumes the same responsibility in respect of any technical information, materials or equipment that it utilises in the performance of the drilling operations. Where either party infringes any intellectual property rights, that party bears the consequences of this breach, except where the drilling contract provides otherwise.³⁹⁹

³⁹⁸ *Rockwater Ltd v Technip France SA (formerly Coflexip SA)* (2004) EWCA Civ 381.

³⁹⁹ See, for instance, *Halliburton Energy Services Inc v Smith International (North Sea) Inc* (2004) EWHC 2286 (Pat).

During the drilling operations, if any potential patent or registrable right emerges from the activities of the contractor, which is wholly based on data, substances, materials, equipment, processes in the contractor's possession at the inception of the contract, the contractor is entitled to those rights. In this vein, the contractor is responsible for pursuing such registration to its logical conclusion, and is expected to grant the operator unfettered, royalty-free licence to such patents or other registrable rights, as well as to any equipment manufactured therefrom.⁴⁰⁰

Conclusion

This chapter examined how risks arise within the drilling process, what those risks are and how they are then reflected in the drilling contract. The discussion commenced with a discourse on the petroleum lifecycle, situating the drilling process and the drilling contract therein. The complex and volatile nature of the drilling process makes it inevitable that risks would arise in all aspects of the process. The consequences of such risks eventuating ranges from property loss or damage, and in extreme circumstances, bodily injury or death. Indeed, the occurrence of certain adverse events has led not only to fatalities, but large numbers of them.

It then becomes crucial to ensure that measures are taken to ensure that adverse events do not occur or that, if they do, a contract party is responsible for bearing the economic consequences of their occurrence. This is what contract parties are expected to do in a structured manner in the drilling contract, and in line with the responsibilities arising therefrom.

However, contract parties have not always allocated risks *inter se*, in the way that is currently done in the drilling contract. Consequently, the courts had to allocate risk between them upon the occurrence of adverse events, guided by doctrines of law as well as extant legislation. Indeed, the legislature also intervened in the risk allocation process where it felt that intervention was

⁴⁰⁰ *United Wire Ltd v Screen Repair Services (Scotland) Ltd* (2000) 4 All E.R. 353.

necessary to protect public interest and social cohesion. Understanding the way in which risk allocation has evolved is relevant in explaining rationales for the current state of practice, as this serves as the bedrock for the manner of that allocation. This evolution is discussed in Chapter 3.

Chapter 3

RISK ALLOCATION BY THE COURTS IN THE ABSENCE OF CONTRACT

Introduction

One may wonder why anybody, besides the parties to a contract, should be concerned about the way in which parties choose to allocate risks within their contract. One would further expect that the principle of *freedom of contract* should ordinarily enable parties to agree the terms and conditions that govern their relationship, and that these should be respected and upheld so long as they are not unlawful. This expectation is far from current reality.

Legislative and/or judicial intervention in risk allocation has been justified for different reasons. The most common is on grounds of *public policy*, which, though devoid of a universally accepted definition, can be conceived of as meaning an action or decision undertaken or made by a government, supra-government or courts⁴⁰¹ or by a private entity acting on behalf of government, which is designed to benefit the citizenry.⁴⁰² This is particularly seen in anti-indemnity statutes in the USA, relating to the construction, oil and gas, and mining sectors. For instance, in the construction sector, Gwyn and Davis note that the legislature was concerned about the worrisome trend of requiring weaker parties to indemnify stronger parties, even for the latter's own negligence,⁴⁰³ and hence the resort to statute.

⁴⁰¹ The UK Supreme Court recently dealt with the issue of public policy in *Patel v Mirza* (2016) UKSC 42. Without defining 'public policy', it confirmed that, *inter alia*, public policy considerations will continue to be paramount in assessing the effect of illegality in claims, with the overarching aim of preserving the integrity, proportionality and coherence of the justice system.

⁴⁰² Hill, M. and Varone, F. (2014) *The Public Policy Process*. Routledge, at pp 15–19. It has also been formulated thus: 'A condition is against public policy if it is in the interest of the state that it should not be performed': Williams, S. W. J. and Sherrin, C. H. (2002) *Williams on Wills. Vol. 1.*, London: Butterworths, at p. 335. The UK courts have generally described public policy and justified several decisions on this basis. In *Egerton v Brown* (1853) 4 HLC 1, Justice Truro made the following pronouncement: 'No subject can lawfully do that which has a tendency to be injurious to the public or against the public good which must be termed, as it sometimes has, the policy of the law or public policy in relation to the administration of the law'.

⁴⁰³ Gwyn, A. H. and Davis, P. E. (2003) 'Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law', *Constr. Law.*, 23, at p. 26.

In the oil and gas sector, Tade⁴⁰⁴ notes that, as a general rule, indemnification for own negligence was not viewed as being contrary to public policy, provided that intent was unequivocally expressed. This is similar to the position in the UK in which indemnification for own negligence, or other breach of contractual obligations, is also permitted if this is the manifest intention of the parties.⁴⁰⁵ However, the Texas anti-indemnity statute⁴⁰⁶ was an exception to this general rule. This is also true of the Louisiana statute.⁴⁰⁷ In these circumstances, the legislature was also concerned that weaker parties were being exploited in the specific sectors to which the statutes applied, and intervened on grounds of public policy.

The public policy rationale is further buttressed by the argument that parties could be induced to behave badly if they thought another party will be responsible for the negative economic consequences of their actions, which is reflected in the manner of risk allocation.⁴⁰⁸ Kleinberger disagrees with this submission, and asserts that the whole notion of indemnity being an inducement for bad behaviour is supported by neither evidence nor logic.⁴⁰⁹ In the UK, the Supreme Court recently indicated in *Cavendish Square Holding BV v Talal El Makdessi*⁴¹⁰ that the courts will be unwilling to interfere in the manner of risk allocation if the bargaining power of parties to a negotiated contract, who have been properly advised, is comparable.⁴¹¹ The court's

⁴⁰⁴ Tade, J. B. (1987) 'Texas and Louisiana Anti-Indemnity Statutes as Applied to Oil and Gas Industry Offshore Contracts', *Hous. L. Rev.*, 24, p. 665.

⁴⁰⁵ See, for instance, *Deepak Fertilisers and Petrochemicals Corp'n v ICI Chemicals & Polymers Ltd* [1999] 1 All ER (Comm) 69.

⁴⁰⁶ TEX. CIV. PRAC. & REM. CODE.

⁴⁰⁷ Tade (1987), *Op.Cit.* at p. 668. The Louisiana Act (LA. Rnv. STAT. ANN.)

⁴⁰⁸ Kleinberger, D. S. (1987) 'No Risk Allocation Need Apply: The Twisted Minnesota Law of Indemnification', *William Mitchell Law Review*, 13(4), pp. 777–842, at pp. 824–825. Kleinberger refers to the hearings before the Law Reform Subcommittee of the Committee on the Judiciary, on the proposed anti-indemnity statute on 6 April 1983. Here, the argument was made that indemnification was a basis for 'passing off' liability – a situation that runs contrary to public safety interests.

⁴⁰⁹ *Ibid.*, at p. 826.

⁴¹⁰ (2015) UKSC 67.

⁴¹¹ *Ibid.*, at para 35.

rationale is that balance of power between the parties puts them in a better position to determine the manner of risk allocation and the applicable consequences in the event of a breach.⁴¹²

Intervention is also rationalised on the ground that risk has not been efficiently or optimally allocated. According to Herring and Kubler,⁴¹³ efficient allocation requires that the risk is allocated to the party who is best able to bear the risk, and this is determined by enquiring into which party is best able to diversify risk more cost-effectively, and who can best avoid the cost of financial distress if the risk event happens.⁴¹⁴

Stretching the efficiency argument, Hartman and Snelgrove suggest that lack of clarity in risk allocation by parties to contracts will lead to project inefficiencies, increased transactional costs, and adversarial relationships.⁴¹⁵ This will justify judicial intervention, the objective of which would be to clarify risk allocation provisions and reach decisions based on the judge's construct of the 'real' intention of the parties.⁴¹⁶

The protection of third-party rights/interests can also be rationalised as a justification for judicial and/or legislative intervention. For these purposes, there are two classes of third parties. The first class is constituted by people who claim that a certain benefit or right has been conferred upon them by a term in a contract that entitles them to legal protection and enforcement of that interest. This class of people relies on the common-law principle of *jus quaesitum tertio* to the effect that a third-party beneficiary to a contract may be able to sue on it and enforce that interest. This is in contra-distinction to the doctrine of *privity of contract* which states that only parties to

⁴¹² This is also consistent with the rationale of the court in *St Gobain Building Distribution v Hillmead Joinery* [2015] EWHC B7 (TCC).

⁴¹³ Herring, R. and Kubler, F. (1994) 'Allocation of Risk in Cross--Border Deposit Transactions', *Northwestern University Law Review*, 89(3), at pp. 942–1028.

⁴¹⁴ *Ibid*, at p. 1014.

⁴¹⁵ Hartman, F. and Snelgrove, P. (1996) 'Risk Allocation in Lump-sum Contracts – Concept of Latent Dispute', *Journal of Construction Engineering and Management*, 122(3), pp. 291–296, at p. 291.

⁴¹⁶ See also Foster, Stephen J., *et al* (2003), *supra*, at p. 12.

a contract may sue and be sued on it. In the UK,⁴¹⁷ they are also afforded statutory recognition under the Contracts (Rights of Third Parties) Act 1999; even though such protection is limited by qualifications that may nullify the real effect of the reprieve supposedly granted.

The second class is made up of people who are negatively impacted by the operations of contracting parties, which cause death, injury or other damage to them, their property or their relatives (in case of death). Protection of such third-party interests is founded on the law of tort and is justified by the duty of care which is owed to persons who are close enough to the contract activity *locus* as to be impacted by it.⁴¹⁸

Flowing from the justifications above, the judiciary and the legislature have intervened with different laws and legal principles that impact on risk allocation in contracts, in general, while some relate more directly to drilling contracts. The effect of these laws and principles is either to nullify, clarify or modify the risk allocation provisions in a contract, which could, in effect, alter the risk allocation originally intended by the parties. Some of these laws and principles apply as a matter of course irrespective of the contracting parties' preferences, while others give parties a choice as to application of the law in its entirety, or allow them to qualify application in the manner prescribed by law.⁴¹⁹

However, to better understand the current state of the risk allocation regulatory regime, the proper foundation has to be laid, and this entails an examination of this regime from the time at which neither contractual parties nor the legislation had made provisions for risk allocation upon the occurrence of certain risk events in the relevant areas that concern this study, and it was down

⁴¹⁷ This Act is applicable to only England, Wales and Northern Island, and excludes Scotland which has its own regulations on the rights of third parties.

⁴¹⁸ This is based on the 'neighbour principle' formulated in *Donoghue v. Stevenson* (1932) AC 562.

⁴¹⁹ See, for instance, the Contracts (Rights of Third Parties) Act 1999. This law gives the promisor the latitude to escape the effects of the Act by astute drafting; additionally, contracting parties can exclude the application of the Act altogether by expressly stating that no third-party rights are intended to be created or enforced in their contract.

to the courts to determine whether or not any liability should be imposed for loss or damage arising from the occurrence of these events. A discussion is necessitated as to the basis upon which they made this determination and, where appropriate, the manner in which they allocated liability for the relevant loss or damage, as well as the consequences, if any, flowing from such allocation of liability.

In examining the decisions that form the bedrock of the risk allocation regime, the focus is on the rationale enunciated by the courts in reaching those decisions. The underlying legal theories of liability for loss or damage that form the basis of these decisions are also discussed to provide clarity and greater understanding.

Thereafter, in Chapter 4 there follows a discussion of how contractual parties have responded to the manner in which the courts allocated liability through the use of contractual provisions (indemnities, limitation of liability, exclusion/exception provisions). Although most contract provisions allocate risk in one manner or the other in order to achieve certain objectives,⁴²⁰ the selected provisions are the primary instruments vide which contractual risk is allocated in a deliberate manner.

The courts' response to the risk allocation approach by contractual parties is then considered, after which the intervention of the legislature is also discussed in Chapter 5, in response to the manner in which both the courts and contractual parties have dealt with this issue.

3.1 Indemnities, Limitation of Liability and Exclusion/Exception Clauses

In this section, the study focuses on indemnities, limitation of liability and exclusion/exception clauses, and how these have evolved till the present day. It proceeds on the assumption that

⁴²⁰ Coates, J. C. IV (2012) 'Allocating Risk through Contract: Evidence from M&A and Policy Implications', *Available at SSRN 2133343*.

contract parties have not allocated risks for certain specified events, leaving the courts to make this allocation. The rationale for the manner in which the courts allocate risk, together with the parties' response thereto, is discussed hereunder.

3.1.1 Loss of Life, Bodily Injury and Damage to Property

3.1.1.1 Default Position – Where Contract Parties Have Not Allocated Specific Risks

When death, injury or damage to property occurs within a contract setting, either to one of the parties or to third parties,⁴²¹ but the contract parties have not allocated the burden of the economic consequences of the occurrence of these events, the courts will first seek to understand the sequence of events that led to that occurrence. In practical terms, and as far as those specific events are concerned, this equates to a situation in which no contract exists, and the persons and events involved fall to be regulated, not by the law of contract, but by the law of torts. The court's role in this regard would be to review the events with a view to making a finding of tortious liability and then allocate responsibility accordingly.

This is inevitably an enquiry into the manner in which contract parties undertook their tasks under the contract, the aim being to determine whether negligence or wilful misconduct can be established. Although negligence and wilful misconduct have been defined previously in this study,⁴²² it is worth noting that, in the absence of contractual provision or definition, the courts necessarily have to resort to the law of torts in order to properly decide the relevant issues of duty and standard of care, as well as the tests as to whether the relevant party met the standard in the particular instance. When there exists concurrent liability in tort and contract,⁴²³ it makes

⁴²¹ For the avoidance of doubt, the third parties being referenced here belong to the second class previously highlighted in the Introduction to Chapter 2.

⁴²² See section 1.6.3 'Negligence/Wilful Misconduct in Risk Allocation'.

⁴²³ Peel, E. and Goudkamp, J. (2014) *Winfield and Jolowicz on Tort*. 19th Ed. London: Sweet & Maxwell, at pp. 7 – 8.

it easier for the courts to make this cross-over, especially because the duty is the same, whether under contract or tort.⁴²⁴

However, a discourse on the manner in which the contract parties undertook their tasks under the contract is incomplete without first understanding how the responsibility for those tasks was assumed, as well as the status of the party that assumed it. The nature of the risk events, and the economic consequences of their occurrence, which will ultimately be borne by the parties, will also aid understanding of the default position in which neither contractual nor legislative provisions cover the resulting events, or the allocation of responsibility for the economic consequences arising therefrom. For the purposes of gaining this understanding, different scenarios that impact the drilling contract, and the relationship between the operator (Blackacre) and the contractor (Whiteacre), are examined hereunder.

3.1.1.2 Whiteacre Undertakes Task X for Blackacre – Without Agreement or Consideration

The drilling contract allocates responsibilities to both parties but is essentially the tool with which the drilling operations are carried out by the contractor (Whiteacre). While most of the tasks required to be undertaken by the contractor will be stated in the contract, it is inevitable that additional tasks may arise during the performance of the contract that Whiteacre undertakes with or without the prior approval of Blackacre. Furthermore, there are tasks that necessitate a variation to the contract, and require additional payment, which is agreed with Blackacre. However, there are also tasks that the contractor performs without seeking recompense for same.

Again, Whiteacre may not, in fact, have any ‘contract’ with Blackacre in the strict understanding of that term, but, nevertheless, undertakes a task for the latter without seeking compensation for

⁴²⁴ *Ibid*, at p. 8.

same. There is undoubtedly still a relationship between Whiteacre and Blackacre, and, while this may not necessarily be proximate enough to be called ‘contractual’, given the absence of *consideration*, it is not so distant as to regard them as strangers. If Blackacre agrees to compensate Whiteacre for the task undertaken, then a contract exists, as parties reached an agreement after the requisite offer and acceptance, and had a mutual commercial exchange. This exchange is called *consideration*, and it is the price that one party pays in return for the promise by the other party,⁴²⁵ which validates their transaction as a bargain: a contract properly so-called. This exchange could be in the form of a right, benefit or interest accruing to one party, or a loss, forbearance or detriment suffered by the other party.⁴²⁶ The law enforces this bargain if, *inter alia*, the consideration is valuable,⁴²⁷ is given by the promisee in return for the promisor’s promise,⁴²⁸ and relates in time and context to the promise it purports to ‘pay’ for.⁴²⁹

Thus, it would be correct to term the voluntary and gratuitous relationship which exists between Blackacre and Whiteacre, in the absence of contract, as a ‘special relationship’, similar to that within the contemplation of the court in *Galoo Ltd. (In liq) & Others v Bright Grahame Murray (a firm) and Another*,⁴³⁰ which introduced the concept of ‘voluntary inter-personal’ relationship that recognised the non-existence of a contract simply because of the absence of consideration.⁴³¹ Thus, whether this non-contractual relationship is labelled ‘special’ or ‘voluntary inter-personal’, the courts have recognised this as being sufficient to create a duty of care.

Unfortunately, harm can ensue during the performance of any of the tasks undertaken by Whiteacre, the economic consequences of which still need to be borne by the parties in the

⁴²⁵ *Currie v. Misa* (1875) LR 10 Ex 153, at 162.

⁴²⁶ *Ibid.*, at 162.

⁴²⁷ *Chappell & Co. Ltd. v. Nestlé Co Ltd* (1960) AC 87.

⁴²⁸ *Tweddle v. Atkinson* [1861] EWHC J57 (QB).

⁴²⁹ *Westminster City Council v Duke of Westminster* (1991) 4 All ER 136, at 145.

⁴³⁰ (1995) 1 All ER 16 (CA).

⁴³¹ *Ibid.*, at 44 per Evans L.J.

absence of contractual or legislative provisions. Over time, the courts have made this allocation based on different rationales leading up to the present time, and the nature of the tasks, circumstances of performance of the tasks, as well as the consequences of the ensuing harm, have all been factors that have been considered as part of the decision-making and risk-allocation process.

Where, for instance, Whiteacre undertakes a task for Blackacre without prior agreement with the latter, and for which no compensation has been agreed or paid, it was said that Whiteacre undertook this task *voluntarily*.⁴³² For a long time, courts were confronted with the issue of determining liability for harm or loss that resulted pursuant to tasks undertaken voluntarily. At the heart of this challenge was whether liability lay in contract or in tort, and this explains the legal conundrum that exists in this area of law till the present day. Grounding liability in contract proved problematic given the absence of ‘*agreement*’ and/or ‘*consideration*’ for the specific task undertaken, even if other ancillary tasks were properly situated within, and provided for, by the contract. In addition, grounding liability in tort required that negligence had to be established, which in turn called into question the scope of the existence of a duty of care,⁴³³ and as to whether Whiteacre owed same to Blackacre, which had been breached in the particular situation.

This difficulty was compounded by the thinking that liability between contract parties could only be based on the intention of contract parties which had been objectively discerned by the court;⁴³⁴ the challenge was that the voluntary task could not be said as having been undertaken pursuant

⁴³² Pollock, S. F. (1950) *Pollock's Principles of Contract*. 13th ed, Sir Percy H. Winfield. ed.: London; Stevens, at p. 140.

⁴³³ Furmston, M. P., Cheshire, G. C. and Fifoot, C. H. S. (2012) *Cheshire, Fifoot and Furmston's Law of Contract*. Oxford University Press, at p. 118.

⁴³⁴ This fact was restated by Lord Hoffmann in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* (2008) UK HL 48.

to the ‘intention’ of the parties, as it was neither within the contemplation of both parties at the time of contract, nor was there any agreement as to the manner that liability will attach thereto. In *De La Bere v Pearson*,⁴³⁵ the courts attempted to resolve this challenge by resorting to a contractual construct which introduced *consideration* into the transaction, justifying the existence of a contract, which could then ground liability for damages.⁴³⁶ This case highlighted the seeming desperation of the courts to assume the existence of contract as a basis for imposing liability, prompting some commentators⁴³⁷ to question the thought process as well as the finding of the court in this regard.

The passing of time made it rather apparent that the approach in *De La Bere v Pearson* was not tenable, and could not be followed in situations where it was clear that there was neither agreement nor consideration for the task undertaken. Indeed, the discourse on liability from voluntary undertakings got bound up with the larger issue of the continued relevance of *consideration*, given the recognition that it narrowed the definition of contract, and sometimes resulted in judgments that were deemed unjust and unreasonable in transactions between parties.⁴³⁸ The doctrine of *consideration* has not been abolished,⁴³⁹ even though this idea has been discussed,⁴⁴⁰ perpetuating the concerns of the English legal system in imposing liability for

⁴³⁵ (1908) 1 KB 280.

⁴³⁶ *Ibid.* In a rather controversial ruling, the court held that, in paying for the newspaper, the claimant had *ipso facto* paid for everything else contained therein, including the contentious financial advice that was offered by the Editor.

⁴³⁷ See, for instance Pollock, S. F. (1950) *Pollock's Principles of Contract*, *supra* at p. 140, where Sir Frederick Pollock argued that the better decision would have been to find that the infraction occurred outside of contract during the performance of a voluntary service. See also Furmston, M. P., Cheshire, G. C. and Fifoot, C. H. S. (2012), *supra*, at p. 117 where the issue is raised as to how payment for the newspaper could equate to payment for a recommendation made after the newspaper had already been bought, and so concluded the contract.

⁴³⁸ Banakas, S. (2009) ‘Voluntary Assumption of Tort Liability in English Law: A Paradox?’. Available at: <https://ueaeprints.uea.ac.uk/id/eprint/29141>; accessed 18 May 2017, at p. 2. See also the discussion on abolishing the doctrine of consideration mooted in Burrows, A., Peel, E. and Chen-Wishart, M. (2010) ‘A Bird in the Hand: Consideration and Contract Modifications’, in Burrows, A.S. & Peel, E. (eds) *Contract Formation and Parties*. Oxford: Oxford University Press, at p. 107.

⁴³⁹ Even though it has been purportedly modified by the Contracts (Rights of Third Parties) Act 1999, which makes it possible for a third party to receive a benefit under a contract without being a party, and without furnishing consideration.

⁴⁴⁰ Burrows, A., Peel, E. and Chen-Wishart, M. (2010) ‘A Bird in the Hand: Consideration and Contract Modifications’, *supra*, at p. 107. See also the comments by Lord Goff in *White v Jones* (1995) 2 A 207, at 262–

damages arising pursuant to voluntary undertakings. It became imperative to seek for a solution that modified *De La Bere*, which would do justice in cases which were clearly not *ex contractu*.

Resorting to *negligence simpliciter* also proved problematic as the basis for liability was the existence of the duty of care owed by Whiteacre to Blackacre,⁴⁴¹ and the courts at the time were inclined to think that the duty of care would arise only where there was a ‘special relationship’ between the parties.⁴⁴² On this basis, the courts denied the existence of the duty of care when this special relationship could not be established.⁴⁴³

This notion of special relationship was given firm judicial expression in *Hedley Byrne v Heller & Partners Ltd*,⁴⁴⁴ in which the court recognised that, aside from relationships based on contract or fiduciary duty, other relationships ‘equivalent to contract’ exist. Important for this study is the fact that the court also introduced the concept of *voluntary assumption of responsibility*, which essentially recognised that circumstances will abound which would have equated to contracts properly so called but for the absence of consideration.⁴⁴⁵ Notwithstanding the gratuitous nature of the relationship between the parties, and the voluntary service rendered, the court found that the relationship was ‘sufficiently proximate’ as to establish a duty of care.⁴⁴⁶ Explaining this principle, the court in *Caparo Industries v Dickman*⁴⁴⁷ clarified that even though a service is rendered voluntarily, the law imputes to the doer, an assumption of responsibility, which becomes the basis for imposing liability.⁴⁴⁸ This also extends to statements and is not

263, where he lamented about the limitations on the law of contract by the requirement of consideration which he deemed unnecessary.

⁴⁴¹ See, for instance, *Donoghue v Stevenson* (1932) AC 562; *MGB Printing & Design Ltd v Kall Kwik UK Ltd* (2010) EWHC 624 (QB).

⁴⁴² Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin's Tort Law*, *supra* at p. 144.

⁴⁴³ See, for instance, *Candler v Crane, Christmas & Co* (1951) 2 KB 164.

⁴⁴⁴ (1964) AC 465.

⁴⁴⁵ *Ibid.*, at 528–529, per Lord Devlin.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ (1990) 2 AC 605.

⁴⁴⁸ *Ibid.*, at 607.

confined to services or tasks rendered. The court also stated⁴⁴⁹ that if there is a dispute as to whether a duty of care was created in respect to a specific event or circumstances, the court could be guided by the three-stage test comprising *foreseeability of the damage; proximity of the parties to warrant a finding of the duty of care; fairness, justice and reasonableness* to make this finding.

Adopting this principle in *Henderson v Merrett Syndicates Ltd.*, Lord Goff stated:

‘...for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages in respect of economic loss which flows from the negligent performance of those services.’⁴⁵⁰

This dictum makes it self-evident that the wrongdoer must also bear responsibility for the economic consequences of the occurrence of the event.

In *Phelps v Hillingdon LBC*,⁴⁵¹ the court very succinctly explained that ‘voluntary assumed responsibility’ is a misnomer, as it gives the impression that a person deliberately and knowingly accepted responsibility in the manner suggested. The court clarified that this assumption was imputed *ex lege* where it deems that a duty of care has arisen. Thus, a person can be held as voluntarily assuming responsibility even in circumstances that he did not consciously or deliberately intend to.

Recently, the court in *Customs and Excise Commrs v Barclays Bank Plc*,⁴⁵² again clarified that assumption of responsibility can arise in a relationship akin to contractual, with characteristics akin to contract, except for *consideration*. This makes it self-evident that where parties have reached agreement for a voluntary task to be undertaken, assumption of responsibility can still

⁴⁴⁹ *Ibid.*, at 617–618.

⁴⁵⁰ (1995) 2 AC 145 at 181.

⁴⁵¹ (2001) 2 AC 619 (HL).

⁴⁵² (2006) UKHL 28, (2007) 1 AC 18, at para 4.

arise. Even more recently, in *Michael v South Wales Police*,⁴⁵³ the UK Supreme Court confirmed that, although the assumption of responsibility doctrine seemed to be applied more widely to cases involving economic loss, there is no reason why it cannot apply to wider contexts, including cases of physical injury or loss/damage to property.

From the foregoing, certain conclusions can be drawn. First, that a service is rendered voluntarily will not exculpate Whiteacre from responsibility to Blackacre. Irrespective of the nomenclature of this relationship – contractual, special or non-contractual – liability will attach, either by reference to the contract terms, or the general principles of negligence, or under the principle of voluntary assumption of responsibility. Given the fact that the latter principle has been cited with approval in case law since *Hedley Byrne*, it can now be regarded as an established principle of law.⁴⁵⁴ Indeed, a commentator has opined that it is now being utilised as an *autonomous basis of a duty of care* in English law, supported by the three-stage test enunciated in *Caparo*.⁴⁵⁵

Secondly, a voluntary task performed by Whiteacre for Blackacre may give rise to concurrent liability in contract and tort. If the courts were to find that a ‘contract’ nevertheless exists, the absence of consideration notwithstanding,⁴⁵⁶ the mere fact that Whiteacre and Blackacre have a contractual relationship does not preclude Whiteacre from owing Blackacre a duty of care in tort, especially if *assumption of responsibility* can be established against Whiteacre.⁴⁵⁷ However, in

⁴⁵³ (2015) UKSC 2, at para. 167.

⁴⁵⁴ See, for instance, *Home Office v Dorset Yacht Co* (1970) AC 1004; *Smith v Eric S Bush* (1989) 1 AC 831; *White v Jones* (1995) 2 A 207; *Caparo Industries v Dickman* (1990) 2 AC 605.

⁴⁵⁵ Banakas, S. (2009) ‘Voluntary Assumption of Tort Liability in English Law: A Paradox?’, *supra*, at p. 2. The tests are foreseeability of the damage; proximity of the parties to warrant a finding of the duty of care; fairness, justice and reasonableness in making the finding of the existence of the duty of care.

⁴⁵⁶ As it happened in *De La Bere v Pearson* (1908) 1 KB 280.

⁴⁵⁷ Mulheron, R. (2016) *Principles of Tort Law*. Cambridge University Press, at p. 18. This is however subject to any expressed intent of the contract parties to exclude or limit liability in tort: *Biffa Waste Services Ltd and Another v Maschinenfabrik Ernst Hese GmbH and Others* (2008) EWHC 6 (TCC) 169(4).

a recent case, the court in *Wellesley Partners LLP v Withers LLP*⁴⁵⁸ accepted the argument that where liability was concurrent, and the claimant pursues both actions independently, the stricter test for determining liability for damages in contract, *the reasonable contemplation* test, should also apply to the claim in tort. The court justified this position by stating that a party cannot be presumed to assume responsibility for a greater scope of damages than what is deemed to be assumed under the contract.⁴⁵⁹

Thirdly, Whiteacre's liability attaches irrespective of the head of damage that occurs. Thus, whether the task results in death, injury, or loss of, or damage to, property, the voluntary nature of the task will not absolve them from liability.

Fourth, notwithstanding the fact that the task undertaken was voluntary and gratuitous, Whiteacre is under a duty to undertake same with reasonable care and skill, and Blackacre can expect that the *quality* of work undertaken should be consistent with that which a professional with similar skill and qualification should produce. Burrows alludes to this when he asserts that a person who receives a free television can sue if it injures him due to a defect, but cannot sue if the television is not working.⁴⁶⁰ The courts agree with this opinion. In the very recent case of *Burgess v Lejonvarn*,⁴⁶¹ the court held that an architect who supplied her services free of charge to her friends owed them a common law duty of care – 'not to provide the services that she had undertaken – but to exercise reasonable skill and care in doing so'.⁴⁶² The court's rationale lay in the fact that, even though no contract existed between the parties, there was an assumption of

⁴⁵⁸ (2015) EWCA Civ 1146.

⁴⁵⁹ *Ibid*, per Floyd, LJ, at para. 68. See Burrows, A. (2016) *A Casebook on Contract*. 5th ed. UK: Hart Publishing, at p. 432 in which Burrows agrees with this rationale and draws a parallel between the reasoning in this case and Lord Reid's reasoning in *Czarnikow Ltd v Koufos (The Heron II)* [1969] 1 AC 350.

⁴⁶⁰ Burrows, A. (2000) *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*. Bloomsbury Publishing, at p. 12.

⁴⁶¹ (2017) EWCA Civ 254; (2017) B.L.R. 277.

⁴⁶² *Ibid*, at paras 74–88.

responsibility by the architect, which made her friends her clients in a *professional* sense, and not necessarily a *contractual* sense.⁴⁶³ Since professionals expected people to place reliance upon their work, a relationship of reliance had been created, which thereby created a duty of care that the architect had breached.⁴⁶⁴

Given the conclusion from *Burgess*, the issue arises as to whether Blackacre can compel Whiteacre to re-perform the task which was performed unsatisfactorily, though gratuitously, or whether they are only entitled to damages. The question is, if Blackacre did not pay for the service in the first instance, can a court order that Whiteacre pay damages for the unsatisfactory performance which amounted to a breach of the duty of care, or will specific performance be ordered? In *Burgess*, the claimants' action for damages stemmed from the fact that they had incurred losses arising from the reliance placed on the advice given by the defendant architect. Although the court recognised that these were economic losses, in respect of which there is a divergence of opinions as to their protection and recovery,⁴⁶⁵ the court did not make the order for payment of damages as this was not pleaded in this action, being an appeal on the preliminary issue of the existence of the duty of care in this circumstance.

It is trite that damages will be awarded only when the claimant has suffered a loss that is recognised by law; if no loss has been suffered, but there has, nevertheless, been a breach, either of duty of care, or of contract, the court may award nominal damages to the innocent party.⁴⁶⁶ It is also settled law that the courts will make an order for specific performance only if damages

⁴⁶³ *Ibid*, at para 85.

⁴⁶⁴ *Ibid*, at para 86.

⁴⁶⁵ For instance, while the court in *Murphy v Brentwood DC* (1991) AC 398 stated that a builder does not owe a duty of care to protect against economic loss, the court in *Robinson v PE Jones (Contractors) Ltd* (2012) QB 44 made a finding that professionals are deemed to assume responsibility for such economic losses.

⁴⁶⁶ Anson, W. R., Beatson, J., Burrows, A. S. and Cartwright, J. (2010) *Anson's Law of Contract*. Oxford University Press, at p. 564.

are not adequate to compensate for the loss suffered.⁴⁶⁷ Thus, if Blackacre can show that they have suffered loss, or that the duty of care owed them has been breached, because of the gratuitous but unsatisfactory task performed by Whiteacre, they may be entitled to damages thereby. It is difficult to imagine a situation in which the court would make an order for re-performance of the work in these circumstances.⁴⁶⁸

3.1.1.3 Whiteacre Undertakes Task X for Blackacre – With Agreement or Consideration

If Whiteacre had secured Blackacre's agreement to the task, but still received no compensation for it, the task would nevertheless be voluntary. Further, because this agreement is not backed by consideration, it is not a contract. The justification for this position, to the effect that no contract exists in gratuitous transactions, can be found in the judicial acceptance of the notion that only transactions which equate to 'bargains' should be enforced.⁴⁶⁹ If there was no exchange in a commercial context, then that transaction was not deemed to be a contract properly so called; it was a gratuitous promise that could only be enforced if it was under deed.⁴⁷⁰ In *Eastwood v. Kenyon*, the court stated that the law requires more than a mere promise or moral obligation for a transaction to be equated to a binding contract.⁴⁷¹

Thus, as far as Whiteacre's liability for any harm that ensued was concerned, the foregoing discussion remains unchanged. Whiteacre's liability was founded, either in negligence *simpliciter* or under the doctrine of assumption of responsibility.

⁴⁶⁷ *South African Territories Ltd v Wallington* (1898) AC 309.

⁴⁶⁸ See, for instance, *Scandinavian Trading Tanker Co A B Respondent v Flota Petrolera Ecuatoriana Appellants* (1983) 2 A.C. 694, at 701 where the court stated that it would generally not compel performance of a contract for the provision of services. See also *Clarke v Price* (1819) 2 Wils. 157.

⁴⁶⁹ Furmston, M. P., Cheshire, G. C. and Fifoot, C. H. S. (2012) *Cheshire, Fifoot and Furmston's Law of Contract*. Oxford University Press, at p. 8.

⁴⁷⁰ Burrows, A. (2000) *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*, *supra*, at p. 3.

⁴⁷¹ (1840) 11 Ad & El 438.

It would be different if the agreement were backed by consideration, as a mutual commercial exchange would have occurred, and their transaction would be a contract properly so-called. Provided that the consideration furnished is valuable,⁴⁷² this transaction will be enforced as matter of law.

If Whiteacre committed an infraction that led to death, injury, or loss of, or damage to, property, in the absence of contractual stipulation, the courts have recognised Blackacre's right to pursue a claim in negligence. This is based on the acceptance that concurrent liability in tort and contract can arise, and that the victim is free to pursue whichever action he deems more advantageous.⁴⁷³ In *Jackson v Mayfair Window Cleaning Co. Ltd.*,⁴⁷⁴ the independence of the claim in negligence from any action for breach of contract was explained by reference to a wider duty of care which Whiteacre owed Blackacre not to damage their property. This duty is different from any obligation owed under the contract, and will subsist despite any contractual duty.⁴⁷⁵ Burrows agrees with this approach, and justifies it by saying that liability in this circumstance will be based on the 'harmful interference' by the defendant and not merely on the fact that Blackacre has not reaped a certain benefit under the contract.⁴⁷⁶ He draws support for his position from Lord Fraser's opinion in *Junior Books Ltd. v Veitchi Co Ltd*,⁴⁷⁷ in which the court recognised that the standard of care imposed by the tort of negligence is higher than whatever is contractually owed by Whiteacre to Blackacre, especially when third-parties have been harmed.⁴⁷⁸

⁴⁷² *Chappell & Co. Ltd. v. Nestlé Co Ltd.* (1960) AC 87.

⁴⁷³ *Wellesley Partners LLP v Withers LLP* (2015) EWCA Civ 1146.

⁴⁷⁴ (1952) 1 All ER 215.

⁴⁷⁵ *Ibid*, at 217–218.

⁴⁷⁶ Burrows, A. (2000) *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*, *supra*, at p. 26.

⁴⁷⁷ (1983) 1 AC 520.

⁴⁷⁸ *Ibid*, at 533, paras E–F.

This position was recently confirmed by the court in *Wellesley Partners LLP v Withers LLP*.⁴⁷⁹ While upholding the right of Blackacre to pursue either action in negligence or contract, and for courts to respect this freedom, the court qualified its ruling by making a change to the principles of causation, stating that the more restrictive approach in contract – *the reasonable contemplation approach*⁴⁸⁰ – would apply in cases of concurrent liability, rather than the tortious approach of *reasonable foreseeability*⁴⁸¹. The court rationalised this position by referring to the prior opportunity for contract parties to reach a consensus on liability and allocation of responsibility, and must be deemed to have operated their contract on that basis. The court found no reason why this consensus should be undermined because of the concurrence of liability in tort, especially when it is the same responsibility that was contractually assumed that is being considered in tort.⁴⁸²

3.1.1.4 Whiteacre Undertakes Task X for Blackacre – Through an Employee or Third Party

If Whiteacre chose to procure the services of another person to undertake the task which Whiteacre was supposed to perform for Blackacre, the status of this person will determine the incidence of liability and assist the court in reaching a determination as to who bears the economic consequences of the occurrence of a harmful event.

For instance, where Whiteacre undertakes the task via an employee, the courts have looked to the doctrine of *vicarious liability* to establish whether the act of the employee can be legally attributed to the employer, Whiteacre, and by extension, the resulting liability and burden of the

⁴⁷⁹ (2015) EWCA Civ 1146.

⁴⁸⁰ To the effect that a contract party is liable for injury/damage resulting from her breach, if at the time of contract, a reasonable person similarly circumstanced would have contemplated injury/damage of that kind as being likely to result from a breach.

⁴⁸¹ *Wellesley Partners LLP v Withers LLP* (2015) EWCA Civ 1146, at para 80. Floyd LJ stated that *reasonable foreseeability* is the primary rule which determines damage recoverable in tort. A reasonable person similarly circumstanced must have reasonably foreseen the damage as being likely to result from the wrongful act.

⁴⁸² *Ibid*, at para 80.

economic consequences of the occurrence of the harmful event. Vicarious liability has been aptly described as the *legal substitution of an innocent party for the wrongdoer*,⁴⁸³ and has been stated to be antithetical to the fundamental thrust of the common law to hold the wrongdoer himself accountable for his wrongful acts.⁴⁸⁴ Although the law allows the victim of the wrongful act to sue Whiteacre in vicarious liability, this does not absolve the employee of his wrongdoing, and the victim has the right to pursue him directly.⁴⁸⁵

Different theories abound as to the rationale of this doctrine. The most common is the ‘*deeper pocket*’ rationale, which justifies pursuit of the employer, as against the employee who caused the infringement, because the former is more able to bear the economic consequences of the occurrence of the wrongful act.⁴⁸⁶ A variant of the economic rationale approaches this from an insurance perspective, to the effect that the employer can absorb the cost of the liability through insurance, and can also adjust product pricing and recovery strategy to internalise these costs.⁴⁸⁷ Again, the *benefit* rationale suggests that the employer who benefits from the employee’s services, should also bear the burden of any wrongful act that results therefrom, as one cannot purport to take a benefit without the corresponding responsibility.⁴⁸⁸ Other rationales include the *selection of employee* justification which asserts that the employer should bear the burden of his poor judgment in selecting an employee capable of causing harm,⁴⁸⁹ as well as the *deterrence* rationale which justifies vicarious liability as it would serve as a warning to all employers as to their potential exposure, and help in ensuring that good employee practices are both mandated and institutionalised.⁴⁹⁰

⁴⁸³ Mulheron, R. (2016) *Principles of Tort Law*, *supra*, at p. 967.

⁴⁸⁴ *Majrowski v Guy's and St. Thomas's NHS Trust* (2006) UKHL 34, per Lord Nichols.

⁴⁸⁵ Mulheron, R. (2016) *Principles of Tort Law*, *supra*, at p. 967.

⁴⁸⁶ Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin's Tort Law*, *supra* at p.554.

⁴⁸⁷ *Various Claimants v Institute of the Brothers of Christian Schools* (2010) EWCA Civ 1106, at 35.

⁴⁸⁸ *Viasystems (Tyneside) v Thermal Transfer (Northern)* (2006) QB 510.

⁴⁸⁹ *Reedie v London and North West Rwy Co.* (1849) 4 Exch 244, at 250.

⁴⁹⁰ *Lister v Hesley Hall Ltd* (2001) UKHL 22, at 65.

Where the status of the employee is not contested, the issue then turns on whether the circumstances of the transaction would permit an application of the doctrine. For Whiteacre to be legally substituted with their employee, the infraction must have occurred *in the course of employment* of the employee.⁴⁹¹ At this point, it is important to state that Whiteacre's authorisation of the task is a good indication of the fact that it was undertaken in the course of employment, but the absence of this authorisation does not preclude the same conclusion.⁴⁹²

This is just one of the tests that the courts developed to discern whether a task was undertaken in the course of employment, and is known as the *Salmond* test.⁴⁹³ This test also confirms that undertaking in an unauthorised or improper manner, a task which the employer has authorised, will not negate a finding that the task was undertaken in the course of employment.⁴⁹⁴ Flowing from this test, the courts have also held that where Whiteacre authorised a task undertaken by an employee, they may not only be vicariously liable for the economic consequences of the occurrence of the ensuing wrongful act, they may also be *directly* liable.⁴⁹⁵ The courts reached this conclusion by differentiating between the strict liability that the doctrine of *vicarious liability* imposes on the employer, and the circumstances in which Whiteacre owes a personal duty of care to Blackacre that was breached. Although the infraction is committed by the employee, the direct liability is ascribed to Whiteacre because they have an overarching duty to ensure that their organisational system neither encourages nor allows infringements of the sort

⁴⁹¹ See, for instance, *Rose v Plenty* (1975) EWCA Civ 5; (1976) 1 All ER 97.

⁴⁹² Heuston, R. F. V. and Buckley, R. A. (1996) *Salmond and Heuston on the Law of Torts*. Sweet & Maxwell, at p.443. See also *Poland v John Parr & Sons* (1927) 1 KB 236 at 240.

⁴⁹³ Propounded by Sir John Salmond: J. Salmond (1907) *Law of Torts*. 1st ed, cited in Mulheron, R. (2016) *Principles of Tort Law*, *supra*, at p. 995.

⁴⁹⁴ Howarth, D., Matthews, M., Morgan, J., O'Sullivan, J. and Tofaris, S. (2016) *Hepple and Matthews' Tort Law: Cases and Materials*. Bloomsbury Publishing, at p. 1089.

⁴⁹⁵ *Phelps v Hillingdon LBC* (2001) 2 AC 619 (HL); *Bull v Devon AHA* (1993) 22 BMLR 79 (CA).

committed by the employee to occur. This duty is said to be non-delegable, giving rise simultaneously to vicarious and direct liability in some circumstances.⁴⁹⁶

Although the *Salmond* test was cited and applied with approval by the courts, it was soon realised that the test was not far reaching enough, especially in cases of deliberate wrong-doing by the employee.⁴⁹⁷ Quite often, the employee's wrongful behaviour could not be construed as an 'improper or unauthorised' mode of carrying on his duties, making it difficult to hold employers vicariously liable even in deserving cases. In *Lister v Hesley Hall Ltd*,⁴⁹⁸ the court laid down another test: the *close connection* test, which enquires whether the wrongful act was *so closely connected with his employment that it would be fair and just to hold the employer vicariously liable*.⁴⁹⁹ This test is admittedly wider than the *Salmond* test – among other reasons because it introduced policy considerations of fairness and justice which allowed the court more discretion in making the connection between the wrongful act and the employee's employment.

As laudable as the court's intent may be, the wide formulation of the *close connection* test has been viewed negatively by some commentators who opine that the wide test has created more confusion, as it does not delineate the scope or degree of connection necessary for a finding of vicarious liability.⁵⁰⁰ This inevitably creates more room for judicial discretion, and ultimately, the courts would arrive at different decisions given the subjective nature of the test, increasing

⁴⁹⁶ Mulheron, R. (2016) *Principles of Tort Law*, *supra*, at p. 969. See also *Majrowski v Guy's and St. Thomas's NHS Trust* (2006) UKHL 34, per Lord Nichols.

⁴⁹⁷ Howarth, D., Matthews, M., Morgan, J., O'Sullivan, J. and Tofaris, S. (2016) *Hepple and Matthews Tort Law: Cases and Materials*, *supra*, at p.1089.

⁴⁹⁸ (2001) UKHL 22; (2002) 1 AC 215.

⁴⁹⁹ *Ibid*, at para 28.

⁵⁰⁰ Jones, M. A. J. (2010) *Clerk & Lindsell on Torts: Third Supplement to the Twentieth Edition. Supplement*. Sweet & Maxwell, at p. 372, para 6–30.

the latitude for confusion.⁵⁰¹ Despite this criticism, the *close connection* test remains relevant till this day, and has been applied by the courts in deciding a plethora of cases.⁵⁰²

Thus, where Whiteacre carry out the voluntary task through an employee, the foregoing confirms that Whiteacre remain vicariously liable for any resulting harm, and must bear the economic consequences of the occurrence of the wrongful act. This study has already established that the voluntary nature of the task notwithstanding, Whiteacre's liability is preserved either in negligence *simpliciter* or under the doctrine of voluntary assumption of responsibility. Since Whiteacre would have themselves been liable for the ensuing harm, undertaking the task through another does not alter this legal position, both by the doctrines of *agency*⁵⁰³ and *vicarious liability*. Furthermore, Whiteacre may also be simultaneously directly liable to Blackacre if the task performed by the employee, and the resulting harm, are underpinned by a non-delegable duty of care owed to Blackacre.⁵⁰⁴

If Whiteacre procured a third party to undertake the task, the courts would enquire into the status of the relationship between Whiteacre and the third party, to determine whether the latter acted as an independent contractor. In the absence of dispute as to status of the third party as an independent contractor,⁵⁰⁵ the courts would proceed based on the general rule that Whiteacre

⁵⁰¹ *Dubai Aluminium Co Ltd v Salaam* (2002) UKHL 48; (2003) 2 AC 366 at para 26.

⁵⁰² For instance, *Majrowski v Guy's and St Thomas's NHS Trust* (2007) 1 AC 224; *Bernard v Att Gen of Jamaica* (2005) I.R.L.R. 398; *Frans Maas (UK) Ltd v Samsung Electronics* (2004) EWHC 1502 (Comm).

⁵⁰³ *Qui facit per alium facit per se*: He who does it through another, does it himself.

⁵⁰⁴ Mulheron, R. (2016) *Principles of Tort Law*, *supra*, at pp. 969–970. See also *Majrowski v Guy's and St Thomas's NHS Trust* (2006) UKHL 34, per Lord Nichols.

⁵⁰⁵ If there is a dispute about the status of the third party as an independent contractor, the courts apply one or more of several tests to resolve this. These tests include: (i) *Control test* which focuses on the employer's ability to direct the manner in which tasks were undertaken – *Short v J&W Henderson Ltd* (1946) 79 LI. L. Rep. 271; (ii) *Integration test*, which investigates the extent to which the task undertaken is integral to the employer's core business – *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* (1952) 1 TLR 101, at 111; (iii) *Economic reality test*, which focuses on whether the third party is in business on his own account, and neither taking any risk in nor partaking in the profits from the employer's business – *Market Investigations Ltd v Minister of Social Security* (1969) 2 QB 173, at 184; (iv) *Mutuality of Obligations test*, which investigates whether the employer has an obligation to provide work, and the third party the obligation to undertake same: *Hewlett Packard Ltd v Murphy* (2002) IRLR 4.

were not vicariously liable for any tort committed by the independent contractor during the execution of the task assigned by the former.⁵⁰⁶ Likewise, Whiteacre would, in general, not be vicariously liable if the tort was committed by the independent contractor's own employee.⁵⁰⁷ The rationale for this was founded in policy, as courts thought it would be unfair to impute liability to the employer who had no control over the way in which the independent contractor undertook his task.⁵⁰⁸

However, there were exceptions to this general rule. In certain circumstances, Whiteacre could be either directly or vicariously liable for the wrongful acts of the independent contractor.⁵⁰⁹ For instance, if Whiteacre authorised or ratified the commission of a tort, liability in this circumstance was direct, rather than vicarious, and so Whiteacre would be jointly liable with the independent contractor to Blackacre for that infringement.⁵¹⁰ The issue that courts have been confronted with in this circumstance is the determination of what constitutes 'authorisation' and/or 'ratification'. This is because the mere fact that Whiteacre commissioned the task does not mean that they authorised the way in which it would be executed.⁵¹¹ This creates the incentive for Whiteacre to be prescriptive as to the manner of undertaking the task which presumably avoids any harm from ensuing. This approach presents its own challenges, because any harm that results from the implementation of the method prescribed by Whiteacre, will potentially expose Whiteacre to direct, as well as vicarious liability, as there is no denying the fact that 'authorisation' occurred in this circumstance. Again, there is the danger that courts may construe this as 'employment' because one of the tests for distinguishing between an employee and an

⁵⁰⁶ *Milligan v Wedge* (1840) 12 A&E 737.

⁵⁰⁷ *Penny v Wimbledon UDC* (1899) 2 QB 72.

⁵⁰⁸ *Rowe v Herman* (1997) 58 Con LR 33 (CA), at 38.

⁵⁰⁹ Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin's Tort Law*, *supra*, at p. 583.

⁵¹⁰ *Ellis v Sheffield Gas Consumers Co* (1853) 17 JP 823; 118 ER 955 (KB).

⁵¹¹ See, for instance, *Jolliffe v Willmetts & Co* (1971) 1 All ER 478 (QB).

independent contractor is the *control test*, which highlights the employer's ability to direct the way in which tasks were undertaken.⁵¹²

Whiteacre could also be directly liable for the tort committed by the independent contractor if the courts find that it selected the latter negligently, or failed to supervise the task effectively. The rationale for this is found in common law, which obligates employers to validate the expertise of a proposed independent contractor, and to do so with reasonable care.⁵¹³ Where harm ensues from the task undertaken by the independent contractor, and it is subsequently discovered that the latter lacked adequate training or expertise to undertake the specific task, Whiteacre's liability is direct, and it becomes a joint tortfeasor with the independent contractor.⁵¹⁴

Whiteacre could also be directly liable for any ensuing harm if it was discovered that the independent contractor has failed to obtain public liability insurance.⁵¹⁵ This is particularly in situations when the independent contractor undertakes 'ultra-hazardous' tasks that have great potential of causing injury.⁵¹⁶ However, there is no overarching duty on the employer to check that the independent contractor carries this insurance in other situations.⁵¹⁷

Whiteacre may be vicariously liable for the wrongful act of the independent contractor that results in harm, where they owe Blackacre a non-delegable duty of care – for instance, ensuring the safety of employees – which has been breached by the negligent act of the independent

⁵¹² See, for instance, *Short v J&W Henderson Ltd.* (1946) 79 LI. L. Rep. 271.

⁵¹³ Mulheron, R. (2016) *Principles of Tort Law*, *supra*, at p. 1010.

⁵¹⁴ In *Jolliffe v Willmet & Co* (1971) 1 All ER 478 (QB), the law firm successfully negated a charge of negligence that could have made it directly and jointly liable with the private investigator that it hired. It demonstrated that it had checked through various competent sources, which had returned a verdict of competence in respect of the private investigator.

⁵¹⁵ Public liability insurance policy covers businesses if members of the public are injured by the activities arising from the business. Even though there is no statutory requirement to carry this insurance (*Naylor (t/as Mainstreet) v Payling* (2004) EWCA Civ 560, at paras 22 and 23), in practice, it has proved as a useful support to businesses as it provides the requisite cover for the unintended and unforeseen circumstances that lead to third-party injury.

⁵¹⁶ *Bottomley v Todmorden Cricket Club* (2003) EWCA Civ 1041; (2003) Q 443.

⁵¹⁷ *Naylor (t/as Mainstreet) v Payling* (2004) EWCA Civ 560, at para 57.

contractor.⁵¹⁸ Although the courts recognise that the employer has not been negligent, the rationale for vicarious liability is found in the thinking that a non-delegable duty remains with the primary obligor permanently. Thus, he may delegate the task, but cannot be absolved from the responsibility which the duty imposes.⁵¹⁹

Unfortunately, the courts have not given enough guidance as to when a duty can be said to be non-delegable. At best, there are examples of statutory and common law duties which the courts have, in deserving circumstances, held to be non-delegable. For instance, different statutes vest public officials with the power to undertake certain tasks, which require that the officials exercise reasonable care in carrying them out. While the courts have found that some of these statutory duties are non-delegable,⁵²⁰ giving rise to vicarious liability, they have also found that some statutory duties are not as far reaching, and that while they are required to be undertaken with reasonable care, do not give rise to vicarious liability; the independent contractor would remain solely responsible for the economic consequences of the occurrence of any ensuing liability.⁵²¹

The common law position on non-delegable duties tell a similar story. For instance, in nuisance, while the court in *Spicer v Smeeth*⁵²² held that employers will generally be liable for torts committed by their independent contractors, the court in *Matania v National Provincial Bank Ltd*⁵²³ held that no such general rule applies, but that liability would depend on whether the task had the ‘inherent risk’ of causing a nuisance, necessitating precautionary measures by the employer, who then falls to be liable if these measures are not taken, and harm results.⁵²⁴

⁵¹⁸ Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin's Tort Law*, *supra*, at p. 583.

⁵¹⁹ Mulheron, R. (2016) *Principles of Tort Law*, *supra*, at p. 1009.

⁵²⁰ *Darling v Att Gen* (1950) 210 L.T. 189.

⁵²¹ *Rivers v Cutting* (1982) 1 W.L.R. 1146.

⁵²² (1946) 1 All E.R. 489.

⁵²³ (1936) 2 All E.R. 633.

⁵²⁴ *Ibid*, at p.646.

If Whiteacre ‘borrowed’ the services of the independent contractor’s employee, during which harm ensued, Whiteacre may be vicariously liable for the resulting tort. The rationale for this is that the independent contractor’s employee was under Whiteacre’s control and direction at the material time when the infraction occurred, and it is only fair and just that they be answerable for any tort committed during this period. This principle was established in *Mersey Docks & Harbour Board v Coggins and Griffiths (Liverpool) Ltd*,⁵²⁵ and was restated recently in *Hawley v Luminar Leisure Plc*.⁵²⁶ The courts have, however, clarified that this principle functions in the manner of a legal presumption, placing ‘a heavy burden’ on Whiteacre, the temporary employer, to rebut, and show, in effect, that the independent contractor still had control of their employee, and remained liable for his negligent act.⁵²⁷

Where the independent contractor voluntarily undertakes the task for Whiteacre, the absence of consideration would mean that no contract exists between Whiteacre and the independent contractor, and certainly none with Blackacre either. If harm ensues, the issue is whether Whiteacre would be vicariously liable for the independent contractor’s tort.

In answering this question, the discourse on the status of a voluntary undertaking of the same task by Whiteacre needs to be restated, as this would provide some insight into his vicarious liability for the independent contractor’s voluntary task that causes harm. In this regard, the study has already taken the position that the voluntary nature of the task notwithstanding, Whiteacre’s liability is preserved either in negligence *simpliciter* or under the doctrine of voluntary assumption of responsibility. Since Whiteacre would have themselves been liable for

⁵²⁵ (1947) AC 1 (HL) 10.

⁵²⁶ (2006) EWCA Civ 18.

⁵²⁷ *Mersey Docks & Harbour Board v Coggins and Griffiths (Liverpool) Ltd*. (1947) AC 1 (HL) 10, per Lord Simon. See also *Biffa Waste Services Ltd and Another v Maschinenfabrik Ernst Hese GmbH and Others* (2008) EWHC 6 (TCC) 169(4) in which the court stated that it would require ‘exceptional facts’ for the responsibility to shift from the temporary employer to the independent contractor.

the ensuing harm, undertaking the task through another does not alter this legal position given the doctrine of *agency*.⁵²⁸

Thus, even if the independent contractor undertakes the task voluntarily, he would still be liable for any ensuing tort he commits. Whiteacre may also be jointly liable with the independent contractor for the tort committed based on the agency relationship with the independent contractor. This agency relationship is created by the fact that Whiteacre appointed the independent contractor and is deemed to have ratified and acquiesced to their actions as well. In *SEB Trygg Holding Aktiebolag v Manches*,⁵²⁹ the court stated that ratification must be unequivocal, and can be inferred from conduct which clearly demonstrates the principal's adoption or recognition of the acts of the agent.⁵³⁰ It further stated that ratification is a *unilateral act of will* which need not be communicated to anyone, even the agent.⁵³¹ This is what the court in *Sino Channel Asia Ltd v Dana Shipping and Trading Pte Singapore, Dana Shipping and Trading SA* termed 'silent ratification'.⁵³² Thus, by accepting the voluntary and gratuitous services of the independent contractor, Whiteacre ratified their actions, *ipso facto* creating an agency relationship between them.

It would be different if the independent contractor undertook the task for consideration, and by extension, that Blackacre also furnished consideration to Whiteacre for the task which they then delegated to the independent contractor. Both relationships are contractual. Thus, if harm ensues during the task, the independent contractor could be concurrently liable to Whiteacre in contract and in tort of negligence.⁵³³ Likewise, Whiteacre could also be concurrently liable in contract to Blackacre and in tort of vicarious liability if the transaction falls within one of the categories that

⁵²⁸ *Qui facit per alium facit per se*: He who does it through another, does it himself.

⁵²⁹ (2005) 2 Lloyd's Rep. 129.

⁵³⁰ *Ibid.*, at 155–156.

⁵³¹ *Ibid.*, at para 97.

⁵³² (2016) EWHC 1118 (Comm), at para 60.

⁵³³ *Wellesley Partners LLP v Withers LLP* (2015) EWCA Civ 1146.

will give rise to vicarious liability. For instance, if the nature of the task that the independent contractor has undertaken is extra-hazardous, and death or injury results, Whiteacre may be vicariously liable for the resulting liability, and can be legally substituted with the independent contractor to bear the economic consequences of the occurrence of the harm.⁵³⁴

Furthermore, Whiteacre may be liable to Blackacre in contract under the express and/or implied terms of the contract which require that the task be carried out in line with the standard ordinarily expected of professionals of like competence and qualification, which thereby imposes a duty on Whiteacre not to damage property or cause any harm.⁵³⁵ The foregoing is, of course, subject to the principle in *Wellesley Partners LLP v Withers LLP*,⁵³⁶ that where liability was concurrent, and the claimant pursues both actions independently, the stricter test for determining liability for damages in contract, the *reasonable contemplation* test, should also apply to the claim in tort.⁵³⁷

3.1.1.5 Liability for Death, Injury and Loss/Damage

Where the performance of the task by Whiteacre results in death or injury to their own personnel, or loss of, or damage to, their (Whiteacre's) property due to their own negligence, the courts traditionally held that they would not give a remedy to right a wrong sustained by a person's own fault.⁵³⁸ The courts' rationale for this stance stemmed from their belief that a person cannot cause injury through his own carelessness, and yet to seek to be rewarded for it.⁵³⁹ In *Cruden v. Fentham*⁵⁴⁰, the court admonished that a person who caused injury through his own act was deemed to have courted that outcome voluntarily, and must suffer the consequences therefrom.

⁵³⁴ *Honeywill & Stein Ltd v Larkin Bros Ltd* (1934) 1 KB 191.

⁵³⁵ *Biffa Waste Services Ltd and Another v Maschinenfabrik Ernst Hese GmbH and Others* (2008) EWHC 6 (TCC) 169(4).

⁵³⁶ (2015) EWCA Civ 1146.

⁵³⁷ *Ibid*, per Floyd, LJ, at para. 68.

⁵³⁸ *Wood v Waterville*, 4 Mass. 422, 423 (1808).

⁵³⁹ Kaczorowski, R. J. (1990) 'The Common-Law Background of Nineteenth-Century Tort Law', *Ohio St. LJ*, 51, p. 1127.

⁵⁴⁰ 2 Esp. 685, 170 Eng. Rep.496 (CP. 1798).

However, progressively, the courts demonstrated willingness to consider the totality of the transaction, especially if someone else was harmed because of the same act of negligence. If they were convinced that despite Whiteacre's negligence, that person could still have avoided the injury to himself, the absence of proximate cause would negate a finding of culpability of Whiteacre.⁵⁴¹ The courts believed that person was still expected to exercise reasonable care even if Whiteacre was responsible for the wrongdoing.

If the negligent act was performed by Whiteacre's employee, on his behalf, and resulted in the employee's death or injury, or loss of/damage to his own property, or indeed death or injury to a third party, or loss of/damage to the third party's property, this raised the issue of liability for Whiteacre on two levels. In respect of the harm that the employee has suffered, there is potentially a direct liability as employer, and vicarious liability for the harm that his negligent act has caused to the third party.⁵⁴²

Whiteacre's direct liability to their employee has been held by the courts to be non-delegable, and whilst not being strict, requires the employer to ensure that there is no want of care.⁵⁴³ What the courts set out to do in this instance is to inquire into whether it was the failure by Whiteacre that was the proximate cause of the negligent performance of the task by the employee that led to his death, injury or property loss/damage. In *Wilsons and Clyde Coal Ltd. v English*,⁵⁴⁴ the House of Lords clarified that this non-delegable duty could be further broken into the duty to

⁵⁴¹ *Davies v Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

⁵⁴² Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin's Tort Law*, *supra*, at p. 541.

⁵⁴³ *ICI Ltd v Shatwell* (1965) AC 656.

⁵⁴⁴ (1938) AC 57.

provide adequate materials⁵⁴⁵ and competent staff,⁵⁴⁶ ensure a proper work system and effective supervision,⁵⁴⁷ and a safe work environment.⁵⁴⁸

Given the non-absolute nature of the non-delegable duty, the court is guided by the circumstances of each case in reaching a determination whether the legal requirement had been satisfied. In all these circumstances, however, the courts have held that the burden is not discharged merely by issuing orders, but by taking concrete steps, and ensuring that these elements of the duty as enunciated in *Wilsons and Clyde Coal Ltd* are present and fit for purpose.⁵⁴⁹

The employer's potential vicarious liability has been discussed in the foregoing paragraphs and needs not be restated. Suffice it to say that the vicarious liability is in respect to the harm caused by the employee's negligent act that resulted in a third party's death, injury, property loss or damage. The negligent act must have occurred *in the course of employment* of the employee.⁵⁵⁰

The question then arises as to whether the conclusions relating to the third party above will be different if that third party was another Whiteacre employee who was engaged in other tasks when the negligent employee's acts caused him, the innocent employee, death, injury, property loss or damage. The issue raised by this scenario is Whiteacre's liability for the tort committed by one employee against another, and fell within the ambit of the doctrine of *common employment*.⁵⁵¹ This doctrine stated that employers were not vicariously liable for the wrongful

⁵⁴⁵ *Parkinson v Lyle Shipping Co Ltd* (1964) 2 Lloyd's Rep. 79.

⁵⁴⁶ *Hudson v Ridge Manufacturing Co Ltd* (1957) 2 QB 348.

⁵⁴⁷ *General Cleaning Contractors Ltd v Christmas* (1953) AC 180, at 194.

⁵⁴⁸ *Latimer v AEC Ltd* (1953) AC 634; *Wilson v Tyneside Window Cleaning Co* (1958) 2 QB 110.

⁵⁴⁹ See, for instance, *Baker v T.E. Hopkins & Sons Ltd* (1959) 1 WLR 966.

⁵⁵⁰ *Rose v Plenty* (1975) EWCA Civ 5; (1976) 1 All ER 97.

⁵⁵¹ This doctrine, which also served as a defence in tort, was developed in the mid-nineteenth century, ostensibly to protect infant industries, given the weakness and inability of the insurance industry to support or bear the economic burden that tortious liability for the employer would necessitate. It was abolished in the UK by the Law Reform (Personal Injuries) Act 1948.

acts inflicted by one employee on another employee, and the rationale for this was founded in the *assumption of risk* principle, which presumed that employees understood and accepted the risks of injury from fellow employees with whom they were in ‘common employment’.⁵⁵² The operation of this doctrine worked a lot of hardship on employees as they could not recover damages in deserving circumstances,⁵⁵³ and the courts in England were inclined towards circumventing its application, especially when the insurance industry became capable of funding the liability payments that would become payable in favour of injured employees.⁵⁵⁴

The courts eventually achieved this objective by developing the *non-delegable duty* principle which meant that the employer could delegate the *performance* of his task and duty to the employee or a third party, but could not delegate the *responsibility* for negligent performance.⁵⁵⁵ Although the doctrine of *common employment* subsisted, the courts’ attitude was to keep curtailing its scope of application, and conversely, keep enlarging the scope of recovery for claimants harshly affected by its strict application.⁵⁵⁶ In *Radcliffe v Ribble Motor Services Ltd*,⁵⁵⁷ the courts further narrowed the doctrine’s application by stating that it only applied where the fellow employees were engaged in ‘common work’, and it would not apply merely because the injured party was another employee. The court’s rationale was that the employees had to be engaged in a ‘joint venture’ that exposed them to the same risks of negligence from each other.⁵⁵⁸

If a third party – an independent contractor – who is undertaking the task for Whiteacre in Whiteacre’s premises dies, is injured or damages/loses his property while performing the task,

⁵⁵² *Priestly v Fowler* (1837) 150 ER 1030.

⁵⁵³ Howarth, D., Matthews, M., Morgan, J., O’Sullivan, J. and Tofaris, S. (2016) *Hepple and Matthews Tort Law: Cases and Materials*, *supra*, at p.1116.

⁵⁵⁴ Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin’s Tort Law*, *supra*, at p. 544.

⁵⁵⁵ *McDermid v Nash Dredging and Reclamation Co Ltd* (1987) AC 906.

⁵⁵⁶ *Smith v Charles Baker & Sons* (1891) AC 325.

⁵⁵⁷ (1939) AC 215.

⁵⁵⁸ Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin’s Tort Law*, *supra*, at p.765.

on whom does liability fall? Based on the position in *Cruden v. Fentham*,⁵⁵⁹ generally, a person who caused injury through his own act was deemed to have courted that outcome voluntarily and must suffer the consequences therefrom. The real issue in this context is whether Whiteacre could be found liable for the resulting harm, irrespective of the independent contractor's fault.

The courts looked to the doctrine of *occupiers' liability* to resolve this issue. This doctrine creates a duty of care on occupiers, owners and tenants of premises in respect of visitors and/or trespassers to the premises, and defines their liability to these categories of people, arising from accidents which may occur because of a defect or dangerous condition.⁵⁶⁰ It was underpinned by the common law philosophy that a landowner had the right to enjoy the use of his land, inviting and excluding whom he willed.⁵⁶¹ However, he still had an overarching duty to ensure that the premises were not kept in a manner that caused harm to those that came upon it, and liability resulted if he failed in that duty.

In determining who an occupier was, the courts applied a *control* test, such that anyone who exercised a degree of occupational control over premises was regarded as the occupier; the greater the degree of this control by an individual, the more likely the finding that the latter is the occupier.⁵⁶² Also, 'premises' was considered as being much more than real estate or bricks and mortar, as it included lifts, aeroplanes, and a berth in the wharf.⁵⁶³ There is no doubt that the area of petroleum authorisation – the contract area or block – where drilling takes place, and the rig, will also qualify as 'premises' properly so-called.

⁵⁵⁹ 2 Esp. 685, 170 Eng. Rep.496 (CP. 1798).

⁵⁶⁰ Jones, M. A. J. (2010) *Clerk & Lindsell on Torts: Third Supplement to the Twentieth Edition. Supplement, supra*, at pp 799–800, para 12-01.

⁵⁶¹ Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin's Tort Law, supra*, at p. 259.

⁵⁶² *Wheat v E Lacon & Co Ltd* (1966) 1 All ER 582, where the 'occupier' was defined as a 'convenient label for the kind of relationship that gives rise to a duty of care'.

⁵⁶³ *Monarch Airlines Ltd. v London Luton Airport Ltd.* (1998) 1 Lloyd's Rep. 403.

In apportioning liability, the courts made a distinction between the *visitor* and the *trespasser*. A visitor was legitimately invited to the premises by the occupier, and could be a *contractor*,⁵⁶⁴ an *invitee*⁵⁶⁵ or a *licensee*:⁵⁶⁶ a *trespasser* was an unwanted intruder, or an *invitee* who had exceeded the scope and tenor of his welcome. The occupier owed the highest duty of care to the *contractor* who was undertaking a task on the premises. The rationale for this was based on the contract between Whiteacre and the contractor, into which the courts implied a warranty relating to the fitness for purpose of the premises where the task was to be undertaken. The occupier was thus liable to the contractor if the state of the premises fell short of the contractual expectation.⁵⁶⁷

The standard of care for *invitees* was lower than for *contractors* but higher than that of *licensees*. In *Indermaur v Dames*, the court held that the occupier was required to exercise reasonable care to ensure that harm does not ensue from *unusual danger* known to, or ought to have been known to him.⁵⁶⁸ The rationale for the lower standard for *invitees* lay in the understanding that only ‘bargains’ – contracts – could give rise to duties of a higher standard, which require deliberate actions by the occupier to comply.⁵⁶⁹ Since *invitees* were not in a contractual relationship with the occupier, no such higher obligation existed. This would also explain why the standard of care towards *licensees* was less affirmative, as the occupier was only required to notify them of any *concealed trap* or other danger source which he knew about.⁵⁷⁰ There was no requirement to be proactive in making the premises safer than it was on their account, and the law did not impute any knowledge of the danger source to the occupier.

⁵⁶⁴ A person with whom the occupier had a contractual relationship, who entered the premises pursuant to, or in connection with, the performance of the contract.

⁵⁶⁵ A person with whom the occupier had a mutual business or interest, who is on the premises in pursuance of that interest.

⁵⁶⁶ A person who is invited to the premises in satisfaction of his own interest, or mutual interest not of a business nature.

⁵⁶⁷ Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin's Tort Law, supra*, at p. 260.

⁵⁶⁸ (1866) LR 1 CP 274.

⁵⁶⁹ Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin's Tort Law, Op.Cit*, at p. 260.

⁵⁷⁰ *Ibid.*

The foregoing makes it clear that the occupier – Whiteacre – can indeed be liable for the harm to the independent contractor if there was a breach of the former’s obligation to maintain the premises in a safe condition as anticipated by the contract between them. If the harm was attributable to an unsafe condition in the premises, for instance if the premises contained pockets of high-pressure gas, then Whiteacre’s liability was direct, and they were unable to escape culpability thereby.

However, the courts have also stated that a competent independent contractor ought to satisfy himself about the safety of the part of the premises in which he is to undertake the task.⁵⁷¹ In *Roles v Nathan*,⁵⁷² Lord Denning MR made it clear that an independent contractor is deemed to be a specialist in his line of business, and should ordinarily appreciate the dangers attendant upon that specific task within the premises, and be cautious of same. The court rationalised this stance by reference to the skill and expertise of the contractor, which should extend to the identification of apparent hazards in the premises, that could ordinarily impact on the safety of their work. Thus, the expertise of the independent contractor and the nature of the hazard on the premises, will be considered in determining whether Whiteacre have failed in their duty of care, and the apportionment of responsibility thereto.

Again, if harm resulted to a third party associated with the independent contractor, due to the latter’s negligence, Whiteacre could be vicariously liable as this study detailed in the foregoing paragraphs. This is especially if Whiteacre fell within any of the exceptions which gave rise to liability for the tort committed by the independent contractor. Thus, in *Bottomley v Todmorden Cricket Club*,⁵⁷³ the court held that the company was vicariously liable to the independent contractor’s agent who was injured due to the independent contractor’s negligence, while the

⁵⁷¹ *Bates v Parker* (1953) 2 Q.B. 231.

⁵⁷² (1963) 1 W.L.R. 1117.

⁵⁷³ (2004) P.I.Q.R. at 18.

agent was lawfully assisting him. The court rationalised this decision based on their finding that the company failed to take the precautions necessary to prevent the ensuing explosion from a hazardous activity on their premises. The court also found that the company failed in their duty to take reasonable care in selecting the independent contractors. It was therefore foreseeable that an accident could occur given the incompetence of the independent contractor as well as the failure to take necessary precaution to prevent the explosion.⁵⁷⁴ In the circumstance, the court also held that it was just and fair to find that vicarious liability arises and was, in this case, properly imputed.⁵⁷⁵

The question then arises as to whether the conclusion in *Bottomley* would be different if the third party were not associated with the independent contractor, but was undertaking other tasks on behalf of Whiteacre, but was either killed, injured or suffered property loss/damage due to the negligent acts of the independent contractor. In this scenario, this third party would be considered as being yet another independent contractor who was in Whiteacre's premises at the same time with the independent contractor who was negligent in undertaking his own task. In this regard, liability could arise on two levels. In this first instance, Whiteacre could be vicariously liable for the tort committed by the negligent independent contractor against the injured independent contractor. Whiteacre could also be directly liable to the injured independent contractor under the doctrine of *occupier's liability* if the harm from the negligent independent contractor arose from the use of the premises in a dangerous manner.

Whiteacre's vicarious liability could arise from any of the circumstances in which the employer would be liable for the tort of the independent contractor examined in the foregoing paragraphs. Thus, where Whiteacre had not investigated and validated the competence of the negligent

⁵⁷⁴ *Ibid*, at para 49.

⁵⁷⁵ *Caparo Industries v Dickman* (1990) 2 AC 605.

independent contractor, they could be vicariously liable for the resulting harm.⁵⁷⁶ In *Gwilliam v West Hertfordshire Hospitals NHS Trust*, the court held that the investigation as to competence necessarily included making an enquiry as to whether the independent contractor had the requisite insurance for the task, but did not include checking the terms of the insurance policy.⁵⁷⁷

Whiteacre's direct liability could arise as the occupier of the premises in which the innocent independent contractor was killed or injured. As detailed in the foregoing paragraphs, if there was a breach of Whiteacre's obligation to maintain the premises in a safe condition as anticipated by the contract between them, and the resulting harm was attributable to an unsafe condition in the premises, then Whiteacre's liability was direct, and they were therefore unable to escape culpability. Thus, the same conclusion in *Bottomley* would apply in this circumstance.

If the third party⁵⁷⁸ were a person not associated with any of the parties to the contract, but had been harmed by the negligent acts of Whiteacre or their independent contractor, the question as to who bore responsibility for the economic consequences of the occurrence of the wrongful acts arises. To answer this question, the status of the third party should first be determined, that is, whether he was a trespasser on the premises in which the harm occurred, or an innocent bystander or passer-by who was harmed by the escape of the hazard from the premises.

If the third party was a trespasser, this means that he came into the premises without the invitation, knowledge and/or consent of the occupier⁵⁷⁹. At common law, occupiers did not owe trespassers any duty of care, and so could not be liable for any harm to them in the occupier's premises, provided there was no intent to deliberately harm them.⁵⁸⁰ This wreaked a lot of

⁵⁷⁶ See, for instance, *Jolliffe v Willmetts & Co* (1971) 1 All ER 478 (QB).

⁵⁷⁷ (2003) Q.B. 443.

⁵⁷⁸ For the avoidance of doubt, the third parties being referenced here belong to the second class of people previously highlighted in the Introduction to Chapter 3.

⁵⁷⁹ Per Viscount Dunedin in *Robert Addie & Sons (Collieries) Ltd v Dumbreck* (1929) AC 358 (HL).

⁵⁸⁰ Peel, E. and Goudkamp, J. (2014) *Winfield and Jolowicz on Tort, supra*, at p. 277, para 10-034.

hardship on the trespassers who wandered upon the premises without ulterior motive, especially children, prompting the House of Lords in *British Railways Board v Herrington*⁵⁸¹ to change the common law position by holding that the occupier owed the trespasser a duty of *common humanity*. This duty was not the same as the common law duty of care, but essentially recognised that the trespasser was not without recourse in deserving circumstances, the trespass notwithstanding. The court's rationale was based on the thinking that common sense requires that the occupier take appropriate steps to warn the trespasser about danger on the premises, and to avert or mitigate same, within reasonable limits. This duty was a duty owed to the trespasser *qua* human being and enured to his benefit by virtue of his humanity.

Thus, where the harm to this third party, who was not associated with Whiteacre or Blackacre, was caused solely by Whiteacre's actions, they may be liable to the trespasser for harm that ensued while the latter was on the premises.

This study has already established the circumstances under which Whiteacre will be vicariously or directly liable for the tort committed by the independent contractor. If the tort was committed by the independent contractor against the third party, and the transaction did not fall under any of the circumstances already discussed, Whiteacre was not vicariously or directly liable, and the liability was solely for the independent contractor.

If the third party was an innocent bystander or passer-by who, not being on the occupier's premises, was harmed by the escape of the hazard from the premises, liability was based on *negligence*, in general, and on the rule in *Rylands v Fletcher*⁵⁸² in particular. For *negligence* to apply in this situation, the courts have held that a duty of care would be imputed to Whiteacre if the resulting harm was reasonably foreseeable, and the relationship between Whiteacre and the

⁵⁸¹ (1972) A.C. 877.

⁵⁸² (1865) 3 H. & C. 774 (Court of Exchequer).

third party was sufficiently proximate to justify a finding that it was fair, just and reasonable to impose liability in the circumstance.⁵⁸³

In *Donoghue v Stevenson*,⁵⁸⁴ the court rationalised the relationship between the manufacturer of the sub-standard ginger beer and the claimant on their thinking that the former must have intended that the product reach the ultimate consumer without the necessity of intermediate inspection, thereby preserving the nexus between the parties, and therefore the liability structure. The court was thus able to impute to the manufacturer, knowledge of the injury that a sub-standard product could cause the ultimate consumer, underpinning their liability.

In similar fashion, the court in *Rylands* imputed to the owner/occupier of a premises, knowledge of the harm that could ensue if something which was brought onto the premises escaped and caused injury.⁵⁸⁵ The courts rationalised this as a strict liability offence, and held Whiteacre liable irrespective of fault. From the ruling in *Rylands*, this would be true even where the escape and harm was caused by a negligent independent contractor.⁵⁸⁶ Whiteacre was strictly liable because something that was put to a non-natural use on their premises escaped and caused injury, and they are inherently responsible for the escape of the thing that they deliberately brought on to their land, knowing that it could cause injury if it escaped.⁵⁸⁷

If Blackacre, their employee or their independent contractor suffered death, injury or loss of/damage to property arising from the negligent act of Whiteacre, their employee or their independent contractor, the assumption is that Blackacre, their employee or independent

⁵⁸³ Jones, M. A. J. (2010) *Clerk & Lindsell on Torts: Third Supplement to the Twentieth Edition. Supplement*. Sweet & Maxwell, at p.420, para 8-12.

⁵⁸⁴ (1932) AC 562.

⁵⁸⁵ Murphy, J. and Witting, C. (2012) *Street on Torts*. 13th ed.: Oxford University Press, UK, at p. 486.

⁵⁸⁶ *Ibid*, at p. 486.

⁵⁸⁷ *Bedfordshire Police Authority v Constable* (2009) EWCA Civ 64, (27).

contractor were proximate to the *locus* at which the task was negligently undertaken, leading to the ensuing harm.

Where the harm was caused directly by Whiteacre, they were liable to bear the economic consequences of the occurrence of the tortious event. As detailed in the foregoing paragraphs, in the absence of contractual provision, the courts have recognised Blackacre's right to recover in *negligence*, based on the doctrine of concurrent liability in tort and contract.⁵⁸⁸ Since only Whiteacre and Blackacre are in a contractual relationship, the other impacted persons – Blackacre's employee and independent contractor – can only seek redress in *negligence*.

Whiteacre's liability is rationalised by the courts by reference to a wider duty of care that Whiteacre owed Blackacre not to cause them harm or injury,⁵⁸⁹ different from Whiteacre's contractual obligations.⁵⁹⁰ This duty is present when third parties have been harmed, and is not dependent on the existence of contract.⁵⁹¹ This is also the basis of Whiteacre's liability to Blackacre's employee and independent contractor.

If the harm was caused by Whiteacre's employee or independent contractor, the question whether Whiteacre is vicariously or directly liable arises again. If the harm was inflicted by the employee in the course of employment,⁵⁹² Whiteacre may be vicariously liable for the economic consequences of the occurrence of the event. Likewise, if the harm was inflicted by the independent contractor in any of the circumstances giving rise to either direct or vicarious liability, Whiteacre would accordingly be liable as such.⁵⁹³

⁵⁸⁸ *Wellesley Partners LLP v Withers LLP* (2015) EWCA Civ 1146.

⁵⁸⁹ *Jackson v Mayfair Window Cleaning Co. Ltd.* (1952) 1 All ER 215.

⁵⁹⁰ *Ibid*, at pp 217–218.

⁵⁹¹ *Junior Books Ltd v Veitchi Co Ltd* (1983) 1 AC 520.

⁵⁹² See, for instance, *Rose v Plenty* (1975) EWCA Civ 5; (1976) 1 All ER 97.

⁵⁹³ See, for instance, *Jolliffe v Willmetts & Co* (1971) 1 All ER 478 (QB).

Where the harm occurs only to Blackacre's employee and/or independent contractor, the issue as to Blackacre's liability to that employee and/or independent contractor, stemming from negligence on the part of Whiteacre, their employee or independent contractor, arises. In this circumstance, Blackacre would be no different from Whiteacre as far as liability for the torts of their own employees and independent contractors is concerned. Thus, Blackacre would be vicariously or directly liable to their employee or independent contractor for the harm committed by Whiteacre, their employee or independent contractor in the circumstances already discussed.

3.1.1.6 Contributory Negligence

A further question arises as to how the courts allocated risks and determined who bore the economic consequences of the occurrence of an event which was caused by the failure of both the claimant and the defendant to take care. In the absence of contractual and legislative intervention, this section examines how the courts dealt with issues in which contributory negligence was alleged as between Whiteacre, Blackacre, their employees and independent contractors.

At common law, if it could be shown that the claimant's fault contributed in some way to the ensuing harm, the courts denied recovery to him because causation had not been established against the defendant.⁵⁹⁴ While not denying the defendant's wrongdoing, the courts would not award damages to a claimant who was also negligent, no matter how trivial his contribution was, on the grounds that a person could not be protected from his own negligence.⁵⁹⁵ The courts were guided, not so much by the quality of the claimant's contribution, but by the fact of its nexus to

⁵⁹⁴ James, F. J. (1937) 'Last Clear Chance: A Transitional Doctrine', *Yale L. J.*, 47, pp. 704–723, at p. 704.

⁵⁹⁵ Murphy, J. and Witting, C. (2012) *Street on Torts, supra*, at p.188.

the ensuing harm to himself. When the defendant successfully raised and proved this defence, it operated as full defence, absolving the latter from liability.⁵⁹⁶

The harshness of this position to claimants, even in deserving circumstances, prompted the courts to rethink their approach. Progressively, the courts sought to ameliorate this harshness, for instance, by stating that mere negligence on the claimant's part would not suffice to deny him recovery; the negligence had to be such that *directly* contributed to the ensuing harm.⁵⁹⁷ In *Davies v Mann*,⁵⁹⁸ the courts laid down the '*last opportunity*'⁵⁹⁹ test, which essentially states that when both parties have been negligent, liability would fall on the party who had the last opportunity to avoid harm from ensuing.⁶⁰⁰ The court's rationale was founded in their belief that it made common sense not to deny a claimant recovery solely based on his contributory negligence, especially when this contribution was insignificant, and the ensuing harm could still have been avoided by the defendant if the latter took due care.⁶⁰¹ Further rationale included reference to *proximate cause* which conceived the claimant's negligent act as being *past*, overtaken in time by the more negligent act of the defendant, even though it contributed to the ensuing harm.⁶⁰²

Although the *last opportunity* test provided some relief from the harsh effects of the common law position, it presented its own problems. For instance, there was some uncertainty as to how to determine which act was last, and as to whether it presented a real opportunity⁶⁰³ which the

⁵⁹⁶ *Butterfield v Forrester* (1809) 11 East 60.

⁵⁹⁷ *Caswell v Powell Duffryn Associated Collieries Ltd* (1940) A.C. 152 at 165.

⁵⁹⁸ (1842) 152 ER 588 (Exch).

⁵⁹⁹ Also called the 'last clear chance' or 'last clear opportunity' test.

⁶⁰⁰ *The Boy Andrew* (1948) A.C. 140 at 148–149.

⁶⁰¹ Jones, M. A. J. (2010) *Clerk & Lindsell on Tort*, *supra*, at p.206, para 3-46.

⁶⁰² James, F. J. (1937) 'Last Clear Chance: A Transitional Doctrine', *supra*, at p. 710.

⁶⁰³ See, for instance, the court's statement in *Leinback v Pickwick Greyhound Lines*, 138 Kan. 50, 65, 23 P. (2d) 449, 456 (1933): 'a chance is a clear chance if exercise of vigilance would have discovered the helpless peril and avoided the injury'. This naturally throws up the issue as to the standard of vigilance expected in individual cases, and the parameters for assessing whether this has been satisfied.

defendant could have utilised to avoid the ensuing harm, the negligence of the claimant notwithstanding. The courts seemed to be straining every nerve to find a reason to exculpate a claimant who had also been negligent, resulting in harm to himself.⁶⁰⁴

Thus, if Blackacre, their employee or independent contractor negligently contributed to the ensuing harm respectively to themselves, the liability of Whiteacre, their employee or independent contractor would depend on whether they had the last opportunity to avoid the harm, which their respective negligence primarily engendered. Since the *last opportunity* test was based on proximity and opportunity, where the circumstances supported this finding, liability was imposed on Whiteacre, their employee or independent contractor for the negligent acts which caused harm to Blackacre, their employee or independent contractor.

3.1.1.7 Commentary

The different scenarios examined so far in this chapter have necessitated recourse to the law of torts, given the absence of contractual and legislative provisions applicable to the specific situations, leaving the courts to adjudicate based on extant principles of law. Although the different rationales for the decisions reached by the courts have been discussed, it is worth noting that in most of the scenarios, the courts have had to resort to the doctrine of reasonableness to do justice.⁶⁰⁵ Indeed, since the test as to whether negligence has occurred is underpinned by what a reasonable man, similarly circumstanced, will do, policy considerations of reasonableness, fairness and justice will always guide the courts in their determination of cases coming within this purview.

⁶⁰⁴ Jones, M. A. J. (2010) *Clerk & Lindsell on Tort, Op.Cit.*, at p. 207, para 3-47.

⁶⁰⁵ See, for instance, *Caparo Industries v Dickman* (1990) 2 AC 605, at pp 617 – 618.

This is particularly important in establishing the existence of the duty of care in a contractual relationship. In giving contract parties the freedom to largely decide their own bargain, the law also expects that they act responsibly, both *inter se* and in respect of the wider community. This is why the law recognises and upholds the notion of *restitutio in integrum*,⁶⁰⁶ the philosophical foundation upon which remedies are founded, as recompense when parties fail to meet the standard they have set for themselves, and also imposes liability when they behave carelessly, in a manner that hurts the other party, and/or the wider community.

When the existence of the duty of care has been established, the next question is whether it has been breached. Generally, this question is answered by resorting to an objective standard which takes into consideration whether a reasonable person of the same skill, knowledge and experience would have committed the same infraction in similar circumstances.⁶⁰⁷ This is particularly so in situations in which a person has held himself out as possessing a certain skill and knowledge, as he would be required to demonstrate the level of expertise held by people of similar skill and knowledge.⁶⁰⁸

The courts are also guided by the probability that a party's acts or omissions may actually increase the likelihood that harm will occur.⁶⁰⁹ The extent of damage that has ensued, or is likely to ensue from those acts or omissions, is also considered in reaching a decision on whether the duty of care has been breached.⁶¹⁰

⁶⁰⁶ This means *restoration to the position that the innocent party would have been but for the breach*: Furmston, M. P., Cheshire, G. C. and Fifoot, C. H. S. (2012), *supra*, at p. 746; *Robinson v Harman* (1848) 1 Exch. 850; *Graham v. Egan* 15 La. Ann. 97, 98 (1860).

⁶⁰⁷ *Blyth v Birmingham Waterworks Co.* (1856) 11 Ex. 781.

⁶⁰⁸ Cooke, J. (2015) *Law of Tort*. 12th Ed. U.K.: Pearson Education Ltd, at p. 154. See also *Bolam v Friern Hospital Management Committee* (1957) 2 All ER 118.

⁶⁰⁹ *Hayley v London Electricity Board* (1965) AC 778.

⁶¹⁰ *Paris v Stepney BC* (1951) AC 367.

Economic efficiency parameters can also be discerned in the manner in which courts have approached the finding of negligence. In what seems to be the courts' own way of discerning the party best able to bear a risk, ability to shoulder the economic consequences of the occurrence of the event have featured in their decisions. Thus, Denning, MR, stated that courts are moving away from the notion of '*no liability without fault*' (emphasis added), to one that questions, '*on whom should the risk fall?*'⁶¹¹ (emphasis added). In this case, the fact that a party had insurance weighed heavily in the mind of the court in making a finding of negligence, as this demonstrated the ability to bear the economic consequences of the occurrence of the event.

Furthermore, the courts seem to be focusing on the real cost of a breach, and have suggested that if the cost of preventing the occurrence of the risk event is less than the severity of the harm that could ensue therefrom, then a finding of negligence is appropriate. For instance, in *Tomlinson v Congleton Borough Council*,⁶¹² the court gave due consideration to the gravity of the injury, the cost of preventive measures, as well as the social value of the activity giving rise to the event in arriving at a decision. Where a positive finding is made as to the cost effectiveness of the preventive measure, it has the effect of shifting the burden of the economic consequences of the occurrence of the event from the claimant to the defendant.⁶¹³

The economic consequences to be borne by the wrongful party in this respect is primarily in the form of damages. This is the primary means of compensating the innocent party for any loss or damage suffered,⁶¹⁴ and it is meant to restore the claimant to the position in which he would have

⁶¹¹ *Nettleship v Weston* (1971) 2 QB 691.

⁶¹² (2003) 3 All ER 1122.

⁶¹³ See, for instance, the ruling in *Latimer v AEC Ltd.* (1953) AC 643, in which it was held, that from a cost perspective, that it ran against the mill of proportionality to close a factory after flooding occurred because the owner had taken reasonable steps to eliminate the after-effects of the episode.

⁶¹⁴ Anson, W. R., Beatson, J., Burrows, A. S. and Cartwright, J. (2010) *Anson's Law of Contract*. Oxford University Press, at p. 563; *Hadley v. Baxendale* (1854) 9 Exch. 341.

been, monetarily, had the contract been performed,⁶¹⁵ or, in the case of third-parties, had the infraction not occurred. In most cases, an action for damages, which is based on negligence, could be brought either in contract, for parties, or in tort, for third parties.⁶¹⁶

When parties did not stipulate any amount in damages in the contract, the court determines what is payable as *damages*, and are primarily guided by the principle of *restitutio in integrum*. Where the parties have stipulated specific amounts, the courts would determine whether the stipulation is indeed a *penalty*, which is not a genuine recompense to the innocent party, but is *in terrorem* of the defaulting party.⁶¹⁷ This distinction between *damages* and *penalties* is discussed below. Since the aim is not to let the claimant profit from the wrongful act of the defaulting party, the court's primary quest from an economics perspective, is to restore the parties or third-party to the *status quo ante*.

If the economics rationale for compensating an innocent party for bodily injury or damage to property is to put him in a position that he would have been, but for the wrongful act of the other party,⁶¹⁸ one would question the rationale for compensation for a dead party or victim who cannot be so restored. The answer to this question is found in the mechanism for calculating the damages payable upon the demise of a victim. Both the courts⁶¹⁹ and commentators⁶²⁰ agree that the *loss of expectation of life* is the basis for compensating the estate of the victim, as the wrongful act is adjudged as cutting short his expectation of longevity. 'Life' is seen as an enjoyable resource of significant value, entitling the estate to recover damages from the wrongful party when this is terminated prematurely.⁶²¹ The victim's prospect of acquiring material

⁶¹⁵ *Robinson v Harman* (1848) 1 Exch. 850 at 855.

⁶¹⁶ McGregor, H. (2003) *McGregor on Damages*. 17th ed. U.K.: Sweet & Maxwell, at p. 962.

⁶¹⁷ Furmston, M. P., Cheshire, G. C. and Fifoot, C. H. S. (2012), *supra*, at p. 785.

⁶¹⁸ *Todorovic v Waller* (1981) 37 ALR 481.

⁶¹⁹ See, for instance, *Benham v Gambling* (1940) 57 T.L.R. 177.

⁶²⁰ See, for instance, Conway, F. X. (1941) 'Damages for Shortened Life', *Fordham L. Rev.*, 10, p. 219.

⁶²¹ *Flint v Lovell* (1935) 1 K.B. 354, at 355.

possessions and indulging in the pleasures of this world on the one hand, and the support that he could have provided to dependants,⁶²² both of which have now been truncated by his untimely death, justify the imposition of liability when the court finds that a breach of the duty of care owed to the victim has occurred.

If wilful misconduct was alleged, the courts would enquire into the mental attitude of the wrongdoer to ascertain whether the wrongful act was deliberately done despite awareness of the consequences. In this regard, the court had to satisfy itself that the wrongdoer courted the natural consequences of his action. Consequently, the mere fact that the act had been committed, harm had ensued, and fault could be ascribed, was not sufficient; it had to be established that the wrongdoer knew and intended the consequences of his action.⁶²³ The courts are also able to come to this conclusion if recklessness can be discerned in the manner in which the alleged wrongdoer conducted himself.⁶²⁴

In not caring about the consequences of his actions, the wrongdoer falls below the standard of behaviour expected under the contract, and would bear the economic consequences of remedying the ensuing harm.⁶²⁵

3.1.2 Liability for Pollution

In the absence of contractual or legislative provision, liability for pollution was dealt with under the tort of nuisance in actions brought at the instance of the injured third party who alleged that his enjoyment of his property had been impacted by the activities of the tortfeasor. In this

⁶²² See, for instance, *Rose v Ford* (1937) A.C. 826.

⁶²³ *TNT Global SPA v Denfleet International Ltd* (2007) EWCA Civ 405.

⁶²⁴ *National Semiconductors (UK) Ltd v UPS Ltd* (1996) 2 LL Rep 212.

⁶²⁵ *Forder v Great Western Railway Co* (1905) 2 KB 532.

instance, the courts would need to decide as between the contract parties, who should bear the liability for the economic consequences of the pollution. The traditional approach of the courts in this regard was to impose fault-based liability,⁶²⁶ essentially to the effect that the loss would lie where it fell. In *Ilford UDC v Beal*,⁶²⁷ the courts restated the fact that nuisance is usually caused by the intentional activities of a party, who can then not be exculpated from liability if the facts and circumstances of the case support this. This presupposes that the ingredients underpinning liability for nuisance are present and have been proved by the claimant.⁶²⁸ In *Sedleigh-Denfield v O'Callaghan*,⁶²⁹ the court held that the appropriate party to be sued is one that bore *some degree of personal responsibility* in nuisance as far as the harmful event was concerned (emphasis added); the courts' rationale was that the resulting harm from the responsible party's actions were foreseeable, and it was reasonable in the circumstances to impose liability.⁶³⁰

In appropriate circumstances, the courts also made findings of vicarious liability, which meant that Whiteacre was made responsible for the pollution caused by their employee, provided this was done in the course of his employment.⁶³¹ The different rationales for imposing liability on Whiteacre in this circumstance were detailed in the foregoing sections of this study, but it suffices to be said that the law allows this legal substitution based on their position that it is fair, just and reasonable to impose liability on the employer for the infraction of the employee who ordinarily works for his overall benefit and under his direction and control.⁶³² Closely related to

⁶²⁶ Fleischer, C. A. (1976) 'Liability for Oil Pollution Damage Resulting from Offshore Operations', *Scandinavian Stud. L.*, 20, pp. 105–144, at p. 109.

⁶²⁷ (1925) 1 K.B. 671.

⁶²⁸ See generally Buckley, R. (1981) *The Law of Nuisance*. Butterworths. which lists the following ingredients: continuous interference; unlawful or unreasonable interference; interference with the use or enjoyment of land or some right over it.

⁶²⁹ (1940) AC 880, at 897.

⁶³⁰ See also *Southwark LBC v Tanner* (2001) 1 AC 1, at 15.

⁶³¹ *Spicer v Smea* (1946) 1 All ER 489, at 493.

⁶³² Fleischer, C. A. (1976) 'Liability for Oil Pollution Damage Resulting from Offshore Operations', *Scandinavian Stud. L.*, 20, pp. 105–144, at p. 109.

this is the fact that Whiteacre may also be liable if the pollution occurred when the employee was doing something *closely connected* with the work he was employed to do, even if the task was not *stricto sensu* within the course of his employment.⁶³³

If the pollution was caused by a third party who was Whiteacre's independent contractor, there are two schools of thought as to whether liability should be imputed to Whiteacre.⁶³⁴ In *Matania v National Provincial Bank Ltd and Elevenist Syndicate Ltd*,⁶³⁵ the court held that an employer would be held vicariously liable for the nuisance committed by his independent contractor where the task to be carried out is inherently prone to the nuisance that resulted. The court focused on the nature of the activity, and was willing to impute *scienter* and liability, especially when the task is of an ultra-hazardous nature. The view of the court in *Matania* runs contrary to the position of the House of Lords in *Read v J Lyons & Co Ltd*,⁶³⁶ in which it refused to recognise an overarching head of liability for ultra-hazardous activities, and, by extension, refused to admit that vicarious liability in this circumstance was presumed.

However, in *Bower v Peate*,⁶³⁷ an earlier case, the court had expressed the opinion that employers owed a non-delegable duty of care to third parties, for the task undertaken by their independent contractors, especially where it was foreseeable that harm could result. The court held that the burden remained with the employer to ensure that appropriate precautionary measures were taken to prevent the eventuation of the potential risk.⁶³⁸

In reconciling both approaches, this study posits that, in seeking to impute vicarious liability on Blackacre – (the employer/operator) – for the pollution caused by Whiteacre – (the independent

⁶³³ *Lister v Hesley Hall Ltd* (2001) UKHL 22, at 65.

⁶³⁴ Murphy, J. (2010) *The Law of Nuisance*. Oxford University Press, at p. 92.

⁶³⁵ (1936) 2 All ER 233.

⁶³⁶ (1947) AC 156.

⁶³⁷ (1876) 1 QBD 321.

⁶³⁸ *Ibid*, per Cockburn CJ.

contractor/driller) – the courts seemed to focus on the party who *authorised* the task rather than solely on the party who *executed* the task. The element of control in deciding the task that was undertaken, as well as who undertook it, was as important as the fact that the resulting harm was foreseeable, given the inherent nuisance content and potential of the specific task.

Where the third party is neither connected with Whiteacre nor Blackacre, he was regarded as a trespasser, and if the pollution was caused by his activities, the issue arose as to which party bore responsibility for the economic consequences of the damage caused by the pollution. The courts usually looked to the occupier of the ‘premises’ as one who had sufficient control of the premises,⁶³⁹ and who had the responsibility of ensuring that no harm came to people on the premises – (invitees, visitors and trespassers) or outside the premises – (innocent bystanders or passers-by).⁶⁴⁰ In this regard, Blackacre – the operator – was regarded as the ‘occupier’ for all intents and purposes, as they were not only in control of the premises, but were typically seized of the responsibility for applying for the requisite permits that enabled the hazardous activity to be carried on. Even if the rig is deemed as the premises, the party who authorised the task – Blackacre – was still deemed to be in control, and would be responsible for the economic consequences of the damage caused by pollution, except where Whiteacre was negligent.

That notwithstanding, the courts did not *prima facie* ascribe liability for pollution by a trespasser to Blackacre. Liability was imputed only if it was proved that Blackacre knew, or ought to have known, about the activities of the trespasser that led to the pollution.⁶⁴¹ Indeed, if it could be proved that Blackacre knew about the interference by the trespasser, but failed to take steps to

⁶³⁹ *Wheat v E Lacon & Co Ltd* (1966) 1 All ER 582.

⁶⁴⁰ Jones, M. A. J. (2010) *Clerk & Lindsell on Torts: Third Supplement to the Twentieth Edition. Supplement, supra*, at pp 799–800, para 12-01.

⁶⁴¹ *Sedleigh-Denfield v O’Callaghan* (1940) AC 880, at 904.

remedy the situation, they were deemed to have ‘adopted’ the nuisance, hence their vicarious liability.⁶⁴²

Apart from vicarious liability, the courts also imposed a regime of strict liability arising from the rule in *Rylands v Fletcher*.⁶⁴³ In this vein, the courts looked to the occupier of the land – Blackacre – as being liable for bringing or permitting the bringing onto his land, dangerous substances which then escape and cause harm to a third party. Even in circumstances in which the occupier has not been personally negligent, the courts have held that the strict liability regime imposes a non-delegable duty which would attract sanctions if breached. In this vein, identifying the *occupier* in this context becomes a critical exercise which the court must undertake before any applicable sanctions can be imposed. Thus, in *Colour Quest Ltd and Others v Total Downstream UK Plc*,⁶⁴⁴ the court had to decide who was the occupier of the premises from which pollution occurred, and thus the appropriate party to sue, as between Total Downstream UK Plc and Hertford Oil Storage Ltd, both of whom were contract parties. The court found that Total Downstream UK Plc was indeed the appropriate party in this circumstance, as it was the legal owner of the pipelines, and then imposed strict liability for the ensuing damage.⁶⁴⁵

In allocating risk between the stakeholders in this instance, the courts were guided by several factors. Of paramount consideration was the urge to strike the right balance between preserving the social benefit of the activity that produced the pollution, and the economic interest of the injured party.⁶⁴⁶ On the one hand, the courts sought to encourage wealth-maximisation which was the natural consequence of the socially beneficial activity, and on the other, to uphold the

⁶⁴² Murphy, J. (2010) *The Law of Nuisance*, *supra*, at p.88. See also *Smith v Littlewoods Organisation Ltd* (1987) AC 241.

⁶⁴³ (1865) 3 H. & C. 774 (Court of Exchequer).

⁶⁴⁴ (2009) EWHC 540 (Comm.).

⁶⁴⁵ *Ibid.* Also available at [2010] EWCA Civ 180.

⁶⁴⁶ Farber, D. A. (2005) ‘The Story of Boomer: Pollution and the Common Law’, *Ecology LQ*, 32, pp. 113–148, at p. 132.

interest and right of the claimant to the full enjoyment and utilisation of his land which had been impacted by the activity of the defendant. Case law shows that the courts did not default to the protection of the so-called socially beneficial activity, as the analysis of the decisions of the courts reveals that they were more focused on the protection of the rights of the claimants.

For instance, in *Adams v Ursell*,⁶⁴⁷ the court had no concerns in choosing to discontinue the defendant's activities which were the source of the nuisance to the claimant. It rationalised their decision on the fact that the defendant could have carried on his business elsewhere without creating nuisance such as was evident in their current location. Although the court acknowledged the socially beneficial nature of the defendant's activities, yet it recognised that the interest of justice was best served by upholding the right of the claimant to full economic value of his property.

The courts were also concerned with balancing environmental concerns with the socio-economic benefits of the activities. Where pollution or other nuisance had occurred, the courts were faced with the option of either issuing an injunction to stop the activity and thereby abate the nuisance, or they could choose to deny an injunction and award damages instead. In deciding, the courts were expected to 'balance the equities' in exercising their discretionary powers,⁶⁴⁸ and would issue injunctions only if damages were not adequate to compensate the aggrieved party.⁶⁴⁹ Generally, the courts were obliged to grant injunctions if it was 'just and fair' in the specific circumstance to do so,⁶⁵⁰ and would normally take into consideration a wide range of factors in making this determination.⁶⁵¹

⁶⁴⁷ (1913) 1 Ch 269.

⁶⁴⁸ Farber, D. A. (2005) 'The Story of Boomer: Pollution and the Common Law', *Op.Cit.*, at p. 133.

⁶⁴⁹ *Morris v Redland Bricks Ltd* (1970) AC 652 at 664.

⁶⁵⁰ *North London Railway v Great Northern Ry* (1883) 11 QBD 30.

⁶⁵¹ See, generally, Murphy, J. (2010) *The Law of Nuisance*, *supra*, at pp.116–122 for some of the factors considered by the courts in making this decision. This list is by no means exhaustive, and merely serves as a guide to the courts.

One such consideration was the economic disproportion in what was at stake for the respective parties. So, if the defendant had a huge investment which was the source of the pollution, the courts undertook an economic analysis of the value of the land of the injured party to determine whether it was optimal to issue the injunction and lose the utility from Blackacre's activity, or permit Blackacre's activity to continue, and, instead, award the claimant damages equivalent to the market value of the claimant's land which had been negatively impacted by pollution arising from Blackacre's activity.⁶⁵² Indeed, the courts sometimes took into consideration Blackacre's economic position in determining the nature and extent of the duty owed the claimant, and the damages to be awarded in the circumstance.⁶⁵³

⁶⁵² *Boomer v. Atlantic Cement Co* 257 N.E.2d 870 (N.Y. 1970).

⁶⁵³ *Goldman v Hargrave* (1967) 1 AC 645; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* (1980) QB 485.

Chapter 4

CONTRACTUAL RESPONSE BY PARTIES

The default position adopted by the courts, and enunciated above, is fault based and, in most cases, entails a contract party bearing the entirety of the economic consequences of the occurrence of specified risk events, once fault – breach of duty of care – is established. This posed significant hardship on contract parties, especially those exposed to risks which outstrip their risk appetite or tolerance limits. This is more so in offshore drilling campaigns, during which catastrophic events with huge economic consequences can and have occurred.⁶⁵⁴ Parties to the drilling contract recognise that if the default risk allocation applies, the contractor may be unable to accept the work, as the economic consequences of the occurrence of the default allocation of risk event might render it insolvent.

This chapter examines the mechanisms that contract parties adopted in responding to the default risk allocation by the courts. In the first instance, the study generally explores the mechanisms adopted and how they have evolved to the present time, indicating how they depart from the fault-based manner of allocation by the courts. Thereafter, the specific manner in which the contract parties have utilised these mechanisms to allocate risk *inter se* in the drilling contract is fully discussed.

4.1 Mechanisms Utilised by Contract Parties in Response to Risk Allocation by Courts

In this section, a full discourse on indemnity clause and its component parts is presented. Thereafter, the other mechanisms – mutual hold harmless, exclusion/exemption, limitation of

⁶⁵⁴ For instance, BP agreed to settle all the claims arising pursuant to the Macondo blowout for \$21 billion: Gilblom, K. and Jordan, A. (2018) 'BP's \$60 Billion Gulf Spill Tab Rises as Lawsuits Wind Down', *Bloomberg Quint*; Bloomberg LP. Available at: <https://www.bloombergquint.com/business/2018/01/16/bp-takes-1-7-billion-charge-on-deepwater-horizon-claims-closure>; accessed 21 January 2018.

liability, liquidated damages, and insurance – are discussed, highlighting how the contract parties utilise same in allocating risk *inter se* different from the way that the courts allocated risk between them in the absence of contract.

4.1.1 Structure and Evolution of the Indemnity Clause

It was against this backdrop that parties decided to alter the default risk allocation method, and adopt the *indemnity* regime. Indemnity is defined as ‘an undertaking by which the promisor agrees to make good any loss or damage the promisee has incurred, or to safeguard the promisee against liability’.⁶⁵⁵ This promisor is also known as the ‘indemnitor’, while the promisee is referred to as the ‘indemnatee’. The indemnity regime essentially exists to provide a framework within which contract parties can allocate risks in a manner which both ensures that contract objectives are met, without any party being unduly burdened by risks that could potentially affect their performance of the contract.

This is particularly true from the contractor’s perspective as the party seised of the responsibility for the actual drilling of the well that is the subject-matter of the contract. Taking on all the burdens of the economic consequences of the occurrence of all the specified and unspecified adverse events arising from the performance of the work under their purview, as would be required by the default risk allocation mechanism, would be too onerous, and could negatively affect the way in which work is performed and, by extension, the achievement of contract objectives. Inevitably, the contractor had to be indemnified by the operator, the latter electing to bear the economic consequences of the occurrence of the events that the contractor is unable to shoulder.

⁶⁵⁵ 30 TEX. JUR. 2d 444 Indemnity § I. (1964). See also Gordon, G. (2011), *supra*, at p.444.

The key elements of the indemnity clauses in the model contracts are discussed in this section. Importantly, the rationale for, and implication of, their inclusion is examined, with a view to providing clarity as to their purport and how they evolved from the bedrock position examined above till the present time.

(a) Requirement to ‘indemnify, defend, release and hold harmless’

(i) ‘*to indemnify ...*’ is defined as a contractual stipulation whereby an indemnitor agrees to pay an indemnitee if the latter has suffered loss arising from certain events.⁶⁵⁶ It has also been defined as ‘securing another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person.’⁶⁵⁷ In *Pitts v Jones*,⁶⁵⁸ the court stated that indemnity represents ‘the right of one party to look to another to satisfy his losses, and may arise under a contract (for example under a contract of insurance) or by operation of law’.⁶⁵⁹ In this study’s construct, and within the context of the offshore drilling contract, this means the obligation to bear the economic consequences of the occurrence of events that have led to losses, damages, liabilities and expenses, accruing to or incurred by another party.

In the UK, Blackacre and Whiteacre recognised that the latter’s liability exposure in a contractual relationship was high, especially when third parties were involved, and sought to mitigate this. To avoid the harshness of the *voluntary assumption of responsibility* principle that applied as stated in the foregoing sections in which Whiteacre undertook voluntary tasks, Whiteacre and Blackacre ensured that their transactions were ‘bargains’ properly so-called by furnishing

⁶⁵⁶ Gordon, G. (2011) ‘Risk Allocation in Oil and Gas Contracts (Chapter 14)’, in Gordon, G., Paterson, J. and Usenmez, E. (eds.) *Oil and Gas Law: Current Practice and Emerging Trends*. Dundee: Dundee University Press, pp. 443-497, at p.444.

⁶⁵⁷ *Dresser Industries, Inc v Page Petroleum, Inc* 853 S.W.2d 505, 508 (Tex.,1993) quoting Black’s Law Dictionary (5th ed. 1979) 692.

⁶⁵⁸ (2007) EWCA Civ 1301.

⁶⁵⁹ *Ibid*, at para 21.

consideration. However, this still did not solve the problem of Whiteacre's liability exposure, especially to third parties. To address this exposure, the parties entered into *contracts of suretyship or guarantee*. These contracts consisted of a promise by Blackacre to 'answer for the debt, default or miscarriage' by Whiteacre,⁶⁶⁰ thereby constituting Blackacre into a *secondary* obligor or guarantor/surety responsible for bearing the economic consequences of any infraction contemplated by the promise, while Whiteacre remained *primarily* liable.

Although this arrangement was a clear departure from, and improvement to, the bedrock scenario in which Whiteacre was sole obligor, it had several flaws. First, the scope of application of the guarantee was limited, as it was intended to apply primarily to transactions in which debt was involved, leaving other commercial transactions subject to the default bedrock scenario in which Whiteacre was solely responsible for bearing the economic consequences of the occurrence of any adverse event. Secondly, the target of the guarantee was always a third party, which meant that as between Blackacre and Whiteacre, the latter remained solely responsible for any loss of life, injury, loss of/damage to property, on both sides, provided that it was caused by Whiteacre's activities. Thirdly, because Blackacre was the secondary obligor whose obligation was triggered only when Whiteacre defaulted on the primary obligation, this meant that Whiteacre still retained sole liability exposure in some cases, thereby defeating the purpose of trying to mitigate the harshness of the bedrock regime.

It was against this backdrop that the indemnity regime arose. Blackacre and Whiteacre now inserted provisions into their contract which offered Whiteacre protection from liability that went beyond debt repayment, and encompassed loss of life, injury, loss of/damage to property, either to Blackacre, Whiteacre, their employees and/or independent contractors. The courts recognised

⁶⁶⁰ See, for instance, *Guild & Co v Conrad* (1894) 2 QB 885, at 896.

the ability of parties to contract out of the default common law position on risk allocation. In *Smit International (Deutschland) v GmbH Josef Mobius*,⁶⁶¹ Morrison J. described the indemnification principle as a ‘*crude but workable allocation of risk ...*’, while the court in *EE Caledonia Ltd v Orbit Valve Co Europe Plc*⁶⁶² stated that it was an industry practice that had arisen to cater for the peculiarities of the oil and gas sector, especially in respect of offshore operations. Although the court in *EE Caledonia Ltd* focused on the oil and gas sector, evidence abounds that the indemnity practice is not exclusive to this sector, encompassing other sectors such as construction,⁶⁶³ marine⁶⁶⁴ and insurance.⁶⁶⁵

However, there were concerns as to the nature of conduct by the contract parties which was permissible under the indemnity regime. Specifically, the UK courts questioned whether negligence – especially when this was attributable to the indemnitee – and wilful misconduct were covered, and, therefore enforceable. From the courts’ perspective, it was one thing for Blackacre to offer liability protection to Whiteacre, but it was another thing to retain that protection when the infraction arose from Whiteacre’s own negligence or wilful misconduct. This was especially against the backdrop of the default bedrock position in which Whiteacre was solely responsible for the consequences of their own negligence.⁶⁶⁶

In *Canada Steamship Lines Ltd v The King*,⁶⁶⁷ this question was considered within the wider issue of construction of contracts. Although this case originated from Canada, it had profound impact on the jurisprudence in the UK, especially because it was decided by the Judicial

⁶⁶¹ (2001) CLC 1545.

⁶⁶² (1995) 1 All ER 174.

⁶⁶³ See, for instance, Meyers III, R. L. and Perelman, D. A. (1988) ‘Risk Allocation Through Indemnity Obligations in Construction Contracts’, *SCL Rev.*, 40, p. 989.

⁶⁶⁴ See, for instance, Chalmers, M. D. E. S. and Owen, D. (1907) *The Marine Insurance Act, 1906*. London: W. Clowes.

⁶⁶⁵ See, for instance, Dionne, G. (ed.) (2013) *Handbook of Insurance*. 2nd ed. New York: Springer Science & Business Media.

⁶⁶⁶ See, for instance, *Sedleigh-Denfield v O’Callaghan* (1940) AC 880.

⁶⁶⁷ (1952) 2 D.L.R. 786 (P.C.).

Committee of the Privy Council. In answering the question as to whether a party could be indemnified for own negligence, the court laid down a three-phase test that provides guidance in this regard.

First, if the indemnity clause expressly exculpates the indemnitee from own negligence, then it must be upheld. Secondly, in the absence of express reference to *negligence*, if the indemnity clause contains words which are wide enough to cover own negligence, then this should also be enforced; however, any doubts are to be resolved in favour of the indemnitor. Thirdly, and flowing from the second test, if the words are wide enough to cover own negligence, then the courts must inquire into other heads of liability that could also be covered other than *negligence*. Where other heads of liability exist, then, in the absence of an express reference to *negligence*, the indemnitee is unable to take the benefit of the indemnity, provided the other heads of liability are not too remote that it could not have been within the contemplation of the indemnitee that protection against it was required.⁶⁶⁸ In formulating the third test, the court relied on an earlier case, *Alderslade v. Hendon Laundry Ltd*, in which the same issue of liability for own negligence was decided, and the court held that an indemnitee would be exculpated if negligence was the only head of liability possible in the circumstance. If this was not the case, then liability for own negligence had to be expressly stipulated to be applicable.⁶⁶⁹

In reaching a decision, the court in *Canada Steamship* was guided by the principles of ‘natural’ construction of the contract terms, to the effect that words should be given their ordinary meaning in the absence of ambiguity.⁶⁷⁰

⁶⁶⁸ *Ibid*, at 793–794.

⁶⁶⁹ (1945) K.B. 189.

⁶⁷⁰ *Canada Steamship Lines Ltd v The King* (1952) 2 D.L.R. 786 (P.C.). See also the statement per Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 898 that words will be given their ‘ordinary, popular, and commonly accepted meaning’. Lord Hoffmann also stated in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* (1997) 2 W.L.R. 945 that where these words have more than one meaning, the circumstances of the transaction will aid the court in discerning the intention of the parties.

This rationale was carried through to subsequent cases, which also applied the test laid down in *Canada Steamship*.⁶⁷¹ In one of the cases that arose in the aftermath of the Piper Alpha disaster, *EE Caledonia Ltd v Orbit Valve Co Europe Plc*, the court affirmed the application of the principle that indemnity clauses are subject to narrow and restrictive construction, especially in respect of the events the indemnity purports to cover.⁶⁷² In the other case that emerged from the Piper Alpha disaster, *Caledonia North Sea Ltd v London Bridge Engineering Ltd*,⁶⁷³ the court applied this principle when it held that a contractual indemnity is the primary indemnity which a contract party has, enabling insurers to exercise the right of subrogation to recover against the wrongful party. That the indemnitee has taken the initiative to insure himself against the same risk the insurer seeks to be subrogated to will not impact on the obligation of the indemnitor to indemnify the indemnitee, neither will it diminish the amount payable thereto.

However, the principles guiding interpretation of contracts were revised in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,⁶⁷⁴ and since indemnity clauses are embedded in contracts, the manner in which they are interpreted will inevitably be caught by the nascent provisions. In *Investors Compensation Scheme Ltd*, Lord Hoffmann stated that the meaning which would now be ascribed to words in a contract would be that which a reasonable person who had the same background knowledge that the contract parties are reasonably expected to possess would ascribe to it. In essence, Lord Hoffmann opined that the ‘natural’, narrow or literal meaning of words in a contract is no longer sufficient for the purposes of construction of contracts, but would now encompass a wider contextual and objective approach.

⁶⁷¹ See, for instance, *Smith v South Wales Switchgear Ltd* (1978) 1 All E.R. 18 (H.L.).

⁶⁷² Termed the Orbit Valve case: (1995) 1 All ER 174.

⁶⁷³ (2002) UKHL4; (2002) 1 Lloyd’s Rep 553, HL.

⁶⁷⁴ (1998) 1 WLR 896.

In the era in which *Canada Steamship* was decided, it was only in the cases of ambiguity in the natural understanding of words that resort to the contextual background could be had.⁶⁷⁵

In *Arnold v Britton*,⁶⁷⁶ the UK Supreme Court further clarified that in implementing the contextual approach laid down in *Investors Compensation Scheme Ltd*, the actual words used by the contract parties are of utmost relevance, and should not be subordinated to the overarching commercial purpose of the contract.⁶⁷⁷ The court was basically cautioning against interpreting a contract in a manner that protected one of the parties but amounted to a re-draft of the contract, thereby rendering the actual words used redundant.

In *Canada Steamship*, the second principle that Lord Morton laid down also stated that the indemnity clause should be enforced even in the absence of express reference to *negligence*, if it contains words which are wide enough to cover own negligence, admonishing, however, that any doubts are to be resolved in favour of the indemnitor, against the party seeking reliance on the indemnity clause, the *proferens*. This principle embodies the *contra proferentem* rule which generally states that ambiguities in contracts are to be construed against the maker, and in the other party's favour.⁶⁷⁸ This is a common-law rule which arose in response to the unequal bargaining positions of contract parties, and sought to protect the weaker parties, who were, in most cases, not the makers of the document. In contemporary times, this rule has been applied to adhesion or standard form contracts where the consumer is deemed to be the weaker party, and seeks to give the latter the benefit of any doubt in the document. By so doing, the courts are tacitly admonishing makers of document to be crystal clear in both intent and meaning of the contract terms.

⁶⁷⁵ See Burrows, A. (2016) *A Casebook on Contract*. 5th ed. UK: Hart Publishing, at p. 245.

⁶⁷⁶ (2015) UKSC 36; (2015) AC 1619.

⁶⁷⁷ *Ibid*, at para. 19.

⁶⁷⁸ *John Lee & Son (Grantham) Ltd v Railway Executive* (1949) 2 All ER 581.

Juxtaposed with the principles laid down in *Investors Compensation Scheme Ltd*, a school of thought believes that the *contra proferentem* rule may be heading into redundancy in UK jurisprudence, especially against the backdrop of the call by Lord Hoffmann for jettisoning ‘old intellectual baggage’ of construction of contracts.⁶⁷⁹ This is consistent with the thinking of the court in the very recent case of *Transocean Drilling UK Ltd v Providence Resources plc*.⁶⁸⁰ Although the Court of Appeal did not condemn the rule, it disagreed with the trial judge for applying the *contra proferentem* rule in that instance, and stated that it had no place when the parties had equal bargaining power,⁶⁸¹ and where the clause sought to be interpreted was beneficial to both parties. Likewise, in the even more recent case of *Persimmon Homes Ltd v Ove Arup and Partners Ltd*,⁶⁸² the same court cautioned that it is to be used as a last resort, even though it recognised that it still plays a limited role in the interpretation of contracts.⁶⁸³

The House of Lords has cautioned that the principles laid down in *Canada Steamship* should not be viewed as a code or statute but merely serve as guidance on the approach for interpreting contracts, as it does not provide ‘certain and predictable’ results each time.⁶⁸⁴ This admonition, notwithstanding, there is evidence that the courts are still guided by the principles in *Canada Steamship* in construing indemnity clauses, as was self-evident in the Court of Appeal decision in *MIR Steel UK Ltd v Morris*.⁶⁸⁵ In this case, the court rejected the argument arising from the *Canada Steamship* principles to the effect that, if liability for own negligence had to be expressly excluded to be enforceable, the same rule should apply to liability for intentional wrongdoing.

⁶⁷⁹ *Investors Compensation Scheme Ltd v West Bromwich Building Society* (1998) 1 WLR 896, at 912–913. See also Lord Hoffmann’s dictum in his dissenting judgment in *Bank of Credit and Commerce International v Ali* (2002) 1 AC 251 at para 62, in which he called for ‘artificial rules’ of construction to be discarded, in preference for the modern trend, ostensibly referring to the principles laid down in *Investors Compensation Scheme Ltd*.

⁶⁸⁰ (2016) EWCA Civ 372, at paras 20–24.

⁶⁸¹ See also *K/S Victoria Street v House of Fraser (Stores Management) Ltd* (2011) EWCA Civ 904; (2012) Ch 497 at para. 68.

⁶⁸² (2017) EWCA Civ 373.

⁶⁸³ See also *Hut Group Ltd v Nobahar-Cookson* (2016) EWCA Civ 128.

⁶⁸⁴ *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* (2003) 2 Lloyd’s Law Reports 61, para 11.

⁶⁸⁵ (2012) EWCA Civ 1397.

The court's rationale was that upholding this argument would be tantamount to a mechanistic manner of construing indemnity clauses.

In line with the new thinking on interpretation of contracts in general, and indemnity clauses in particular, the courts seem to have adopted the approach in *Investors Compensation Scheme Ltd*. In *Westerngeco Ltd v ATP Oil & Gas (UK) Ltd*,⁶⁸⁶ the court stated that where the intention to indemnify for liability for own negligence is manifest in the contract, the intention is usually enforced. The court then went on to clarify that this intention must be discerned by construing the contract in its entirety, and not just the provisions of the indemnity clauses. In the present case, the relevant contract was substantially based on the LOGIC Offshore Services form⁶⁸⁷ which clearly allows indemnification for own negligence. The relevant indemnity clause⁶⁸⁸ relating to liability to third parties, occasioned by the contractor's negligence, contained the parties' agreement that the contractor would be indemnified by the operator in respect of any amount by which the third-party liability was greater than the total contract sum. However, the clause stated that it had to be a 'liability under this contract' – a provision that seemed straightforward and non-controversial. In denying the indemnity sought, the court was guided by the construction of the contract in its entirety, and found that the parties had clearly intended 'liability under this contract' to mean liability only between the contract parties, not extending to third parties. The court's rationale for this decision was that contract parties were bound by the wording and intent of their *whole* contract, and this intent would be given effect, especially when contract parties had access to legal advice.

⁶⁸⁶ (2006) EWHC 1164 (Comm).

⁶⁸⁷ Clause 19, LOGIC General Conditions of Contract for Offshore Services, Edition 1-June 1997, at <https://www.logic-oil.com/content/standard-contracts-0> accessed 25 June 2017.

⁶⁸⁸ Clause 19.8 of the contract.

In the USA, before contract parties inserted indemnity provisions into their contracts, the courts have been willing to hold that the obligation to indemnify may be imposed under the common law.⁶⁸⁹ The rationale was that there were factual situations in which equity and good conscience made it inevitable that the onus of meeting the financial obligations of a judgment needed to shift from a party who was seeking indemnification, to the other party against whom this was sought. Being guided by notions of equity and good conscience, this regime crystallised into an *equitable indemnity* principle premised on the rationale that a contract party has a right of recovery against another party who caused him, the former, to incur liability and/or expenses.⁶⁹⁰ This was an extension of the argument that a person is responsible for the consequences of his tortious act, especially those which cause harm or loss to be incurred.⁶⁹¹

Rather than leave this within the exclusive domain of common law, parties subsequently made provisions for the obligation to indemnify in their contracts. Where parties have provided for indemnities in their contract, the courts have held that the obligation to indemnify applied only when the wording of the contract was clear and unambiguous. Like any other provision in the contract, the obligation to indemnify will be construed in line with the extant principles of interpretation to discern the intent of the parties.⁶⁹² Thus, words will be given their ordinary, and natural meaning, and where these words have more than one meaning, the background and circumstances of the transaction will aid the court in discerning the intention of the parties, and evidence in this regard will be admitted.⁶⁹³

⁶⁸⁹ *Herrero v Atkinson*, 227 Cal. App. 2d 69, 74 (Ct. App. 1964).

⁶⁹⁰ *Li v Yellow Cab Co*, 532 P.2d 1226 (Cal. 1975).

⁶⁹¹ *Am. Motorcycle Ass'n v Superior Court*, 578 P.2d 899, 912 (Cal. 1978).

⁶⁹² *Safeco Ins. Co. of Am. v. Gaubert*, 829 S.W.2d 274, 281 (Tex.App.1992).

⁶⁹³ *Breaux v Halliburton Energy Servs.*, 562 F.3d 358, 364 (5th Cir. 2009).

Once the courts have ascertained the intent of the parties, the obligation of the indemnitor is then construed strictly and narrowly, in line with the doctrine of *strictissimi juris*,⁶⁹⁴ to the effect that the indemnity obligation cannot be extended beyond the express provisions of the contract, either by implication or construction.⁶⁹⁵

Indeed, the courts have taken the position, not only to interpret the indemnity clauses strictly, but have also decided that this will be interpreted strictly *in favour of the indemnitor*.⁶⁹⁶

However, this does not preclude the application of the *contra proferentem* rule of construction if there is an ambiguity in the wording and/or intent of the indemnity clause. As usual, this will be construed against the indemnitor if the latter is the maker of the document and/or seeks to rely on it.⁶⁹⁷ At first glance, this looks like a contradiction to the *strictissimi juris* principle, however this study posits that the two principles are complementary and not contradictory. Since the *contra proferentem* principle is a rule of construction, it will be the first in time to apply, as it aids in determining the *intent* of the parties. It is only after this intent has been determined that the *extent* of the reach of the indemnity obligation can be investigated, with the *strictissimi juris* principle applying to ensure that the boundaries of the obligation are not breached.

The obligation to indemnify makes a fundamental assumption that the specific events that will trigger the enforcement of the indemnity are also clearly expressed and defined. Where an event

⁶⁹⁴ Meaning 'to be interpreted in the strictest manner, or of the strictest right or law': Black's Law Dictionary (7th ed.1999) 1435. It has been labelled as being a principle of substantive law: *Torain v Clear Channel Broadcasting, Inc* 651 F.Supp.2d 125, 149 (S.D.N.Y., 2009).

⁶⁹⁵ See *E.I. Du Pont De Nemours & Co v Shell Oil Co*, 259 S.W.3d 800, 805 (Tex.App.2007).

⁶⁹⁶ *Baird v Lease Acquisition Partners, Inc* 2000 WL 1508263, 3 (Tex.App.-Austin).

⁶⁹⁷ See, generally, Boardman, M. E. (2005) 'Contra Proferentem: The Allure of Ambiguous Boilerplate', *Mich. L. Rev.*, 104, p. 1105.

does not come within the purview of the obligation as captured in the contractual provision, the courts have interpreted this *strictissimi juris* so as to deny cover.⁶⁹⁸

The current position of the law in the USA relating to indemnities was confirmed in *Re: Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico*,⁶⁹⁹ in the aftermath of the Macondo disaster. In a summary judgement in the Transocean/BP litigation, Judge Barbier restated the position of the law relating to the scope and effect of indemnities. In rejecting BP's argument which was to the effect that the scope of the obligation to indemnify Transocean⁷⁰⁰ did not extend to sole or gross negligence for subsea pollution, the court held that indemnity provisions will be given their plain meanings in the absence of ambiguity.⁷⁰¹ In the present case, since there was

⁶⁹⁸ 'A Turtle Offshore' (2008) EWHC 3034. See also *Corbitt v Diamond M. Drilling Co*, 654 F.2d 329, 333 (5th Cir. Unit A Aug. 1981).

⁶⁹⁹ The Transocean/BP litigation, Case 2:10-md-02179-CJB-SS Document 5446 Filed 01/26/12 at United States District Court Eastern District of Louisiana. The summary judgment was handed down on 26 January 2012.

⁷⁰⁰ As contained in the combined effect of Arts 24.1, 24.2 and 25.1 of the drilling contract between them.

⁷⁰¹ The Transocean/BP litigation, Case 2:10-md-02179-CJB-SS Document 5446, *Op.Cit* at p.5. The drilling contract is available at http://www.sec.gov/Archives/edgar/data/1451505/000145150510000069/exhibit10_1.pdf accessed 28 June 2017. The original parties were Vastar and Reading & Bates, forerunners to BP and Transocean respectively.

The relevant provisions are as follows:

Article 24.1: Contractor shall assume full responsibility for and shall protect, release, defend, indemnify, and hold Company and its joint owners harmless from and against any loss, damage, expense, claim, fine, penalty, demand, or liability for pollution or contamination, including control and removal thereof, originating on or above the surface of the land or water, from spills, leaks, or discharges of fuels, lubricants, motor oils, pipe dope, paints, solvents, ballast, air emissions, bilge sludge, garbage, or any other liquid or solid whatsoever in possession and control of contractor and without regard to negligence of any party or parties and specifically without regard to whether the spill, leak, or discharge is caused in whole or in part by the negligence or other fault of company, its contractors, (other than contractor) partners, joint venturers, employees, or agents. In addition to the above, contractor to a limit of fifteen million dollars (us\$ 15,000,000.00) per occurrence, shall release indemnify and defend company for claims for loss or damage to third parties arising from pollution in any way caused by the drilling unit while it is off the drilling location, while underway or during drive off or drift off from the drilling location.

Article 24.2: Company shall assume full responsibility for and shall protect, release, defend, indemnify, and hold Contractor harmless from and against any loss, damage, expense, claim, fine, penalty, demand, or liability for pollution or contamination, including control.

Article 25.1: Except to the extent any such obligation is specifically limited to certain causes elsewhere in this contract, the parties intend and agree that the phrase "shall protect, release, defend, indemnify and hold harmless" means that the indemnifying party shall protect, release, defend, indemnify, and hold harmless the indemnified party or parties from and against any and all claims, demands, causes of action, damages, costs, expenses (including reasonable attorneys' fees), judgments and awards of any kind or character, without limit and without regard to the cause or causes thereof, including pre-existing conditions, whether such conditions be patent or latent, the unseaworthiness of any vessel or vessels (including the drilling unit), breach of representation or warranty,

no ambiguity, a mere disagreement over the meaning of the words will not erode the obligation to indemnify and make Transocean whole in respect of the compensatory damages owed to third parties, arising from claims relating to the subsea pollution.⁷⁰²

(ii) ‘*to defend...*’ is the obligation to shield from, or support another party in respect of court proceedings, allegations, suits, claims, which may be instituted against him pursuant to a contract, irrespective of the fact that the proceedings may have no basis, or are fraudulent or false.⁷⁰³ In *Argos Ltd v Argos Systems Inc*,⁷⁰⁴ this was defined as stepping in to defend a claim brought pursuant to a breach.⁷⁰⁵ In the UK, the courts have drawn a distinction between the *duty to indemnify* and the *duty to defend*. In *Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd*,⁷⁰⁶ the court held that the duty to defend will not be automatically assumed unless it is expressly stated in the contract.⁷⁰⁷ This is notwithstanding the fact that the subject contract already contains the duty to indemnify. This is consistent with the decision in *John Wyeth & Brother Ltd v Cigna Insurance Co of Europe SA NV (No. 1)*,⁷⁰⁸ which had suggested that the obligation to defend an action in court may arise before the obligation to indemnify, which may or may not arise.⁷⁰⁹ The rationale of the court was based on their acceptance of the argument that there is a difference between the obligation to reimburse costs upon the establishment of the claims in a given action, and the obligation to pay for the cost of the action itself.⁷¹⁰

expressed or implied, breach of contract, strict liability, tort, or the negligence of any person or persons, including that of the indemnified party, whether such negligence be sole, joint or concurrent, active, passive or gross or any other theory of legal liability and without regard to whether the claim against the indemnitee is the result of an indemnification agreement with a third party.

⁷⁰² *Ibid*, at p.6.

⁷⁰³ G. Hilliker, *Liability Insurance Law in Canada*, 3rd ed. (Toronto and Vancouver: Butterworths, 2001), cited in Sheehan, M. F. (2002) ‘Duty to Defend: General Principles’, *Fasken Martineau*, Available: Fasken Martineau DuMoulin, LLP; <http://www.fasken.com/files/Publication/> accessed 15 February 2017).

⁷⁰⁴ (2017) EWHC 231.

⁷⁰⁵ *Ibid*, at para 339(3).

⁷⁰⁶ (2013) EWHC 349 (Comm); (2013) 2 All E.R. (Comm) 97.

⁷⁰⁷ *Ibid*, at para 28.

⁷⁰⁸ (2001) EWCA Civ 175; (2001) Lloyd’s Rep. I.R. 420.

⁷⁰⁹ *Ibid*, at para 35.

⁷¹⁰ *Ibid*, at para 41.

Where an indemnitor has been notified by the indemnitee of a contingent liability, and the former refuses to uphold his separate duty to defend, he is estopped from questioning the validity and quantum of payment which the indemnitee makes to the third party in this circumstance if eventually the duty to indemnify is triggered. In *Cheltenham & Gloucester Plc v Sun Alliance and London Insurance Plc*,⁷¹¹ the court held that this estoppel will apply unless the indemnitor has expressly disclaimed liability to the indemnitee and expresses no interest in either defending the third-party action or getting involved in the quantum of payment involved.⁷¹²

Although the duty to defend imposes an obligation on the indemnitor to fund the legal proceedings for the benefit of the indemnitee, it does not impose an obligation on the indemnitee to consign the actual handling of the defence to the indemnitor. In *Codemasters Software Co Ltd v Automobile Club de l'Ouest*,⁷¹³ the court held that the indemnitee has the right to request the indemnitor to conduct the legal proceedings on his (indemnitee's) behalf, but it is not mandatory that the indemnitor take over these proceedings.⁷¹⁴ Indeed, the right of the indemnitee to choose his own counsel and conduct his own proceedings has been recognised and upheld in the UK. In *Pine v DAS Legal Expenses Insurance Co Ltd*,⁷¹⁵ the court held that an indemnitee who had a 'before the event' (BTE) insurance,⁷¹⁶ had the right to appoint her own counsel, and refused to recognise the high value and complexity of the case as 'exceptional circumstances' that would enable the insurance company to exercise the right of appointment. The rationale of the court is found in their thinking that mandating the indemnitee to utilise a barrister appointed

⁷¹¹ (2001) S.C. 965; (2001) S.L.T. 1151.

⁷¹² *Ibid.*, at para 16.

⁷¹³ (2010) F.S.R. 12; (2009) EWHC 2361 (Ch).

⁷¹⁴ *Ibid.*, at para 40.

⁷¹⁵ (2011) EWHC 658 (QB).

⁷¹⁶ That is, insurance obtained before the cause of action giving rise to legal proceedings. This right to appoint own counsel in this type of insurance is usually subject to 'exceptional circumstances' which then entitle the insurance company/indemnitor to make this appointment. There is no indication as to what would constitute 'exceptional circumstances', and this remains a question of fact.

by the insurance company, was tantamount to making her utilise the services of a legal representative that was not her choice and was therefore a breach of her insurance policy.⁷¹⁷ This right has now been protected by law.⁷¹⁸

There is no indication that the consent of the insurance company/indemnitor is required for the indemnitee to validly exercise the right of appointment; the insurance contract/policy should already grant this right, and the law upholds it. However, if contractual consent were required, the courts have recently given guidance on their expectation as to how this should be approached. The issue of contractual consent was dealt with in the case of *Braganza (Appellant) v BP Shipping Ltd and another (Respondents)*.⁷¹⁹ In this case, the court, citing another case,⁷²⁰ stated that:

‘[A] decision-maker’s discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused’.⁷²¹

If the court in *Pine v DAS Legal Expenses Insurance Co Ltd* had used the same rationale stipulated above, it would have come to the same conclusion that ‘exceptional circumstances’ had not been made out by the indemnitor, and it would have amounted to a lack of good faith and arbitrariness to fetter the discretion of the indemnitee to appoint her own counsel. It would appear that the right of the indemnitor, as a contract party, in exercising the discretionary right of consent, needs to stand up to the same standard of scrutiny enunciated in *Braganza*.⁷²²

⁷¹⁷ See also *Brown-Quinn & Another v Equity Syndicate Management Limited & Another* (2011) EWHC 2661.

⁷¹⁸ Insurance Companies (Legal Expenses Insurance) Regulations 1999.

⁷¹⁹ (2015) UKSC 17; on appeal from (2013) EWCA Civ 230.

⁷²⁰ *Socimer International Bank Ltd v. Standard Bank Ltd* [2008] EWCA Civ 116, paras 60–66.

⁷²¹ *Braganza (Appellant) v BP Shipping Ltd and Another (Respondents)* (2015) UKSC 17 at 33.

⁷²² See generally Hooley, R. (2013) ‘Controlling Contractual Discretion’, *The Cambridge Law Journal*, 72(01), at pp. 65–90.

The duty to defend has been held to apply even in criminal proceedings in circumstances in which the indemnitee's actions, and grounds for the criminal proceedings, have arisen in the course of an obligation performed pursuant to a contract. In *Coulson v News Group Newspapers Ltd*,⁷²³ the court held that it was not contrary to public policy for an indemnitor to pay the legal fees of an indemnitee facing a criminal charge, drawing a parallel with the functions of the Criminal Defence Service, the office in the UK that pays for legal representations for those faced with criminal charges that are unable to afford same. The court's rationale is found in the thinking that the performance of one's obligation in a criminal manner does not frustrate an indemnity and would cover payment for activities such as the proceedings in the police station during interviews, as well as the bail process, as these were integral parts of the criminal justice system.⁷²⁴

In the USA, the obligation to defend is different from the obligation to indemnify and, like the entire notion of indemnity, arose from the insurance industry.⁷²⁵ However, this was not always the approach of the courts. In *Crawford v Weather Shield Manufacturing, Inc*,⁷²⁶ the court held that the duty to defend was embedded in the duty to indemnify, and this would be presumed by the court unless the parties express a contrary intention.⁷²⁷ According to the court, the duty to defend actually exists *prior* to the legal proceedings that determine whether indemnification is required in the instant case, and so is not dependent on the outcome of those proceedings.⁷²⁸ The court drew a distinction between the duty to *defend* and the duty to *reimburse* the costs of defence upon the conclusion of proceedings, and held that since the latter stems from the duty to

⁷²³ (2013) 1 Costs L.O. 117; (2013) I.R.L.R. 116.

⁷²⁴ *Ibid*, at para 61.

⁷²⁵ *Farmers Texas Mutual County Insurance v Griffin*, 955 S.W.2d 81, 41 Tex. Sup. Ct. J. 103 (Tex. 1997). This is also true for the common law of Canada, a history of which is documented in Sheehan, M. F. (2002) 'Duty to Defend: General Principles', *Ibid*, at p. 2.

⁷²⁶ 187 P.3d 424 (Cal. 2008).

⁷²⁷ *Ibid*, at p. 434.

⁷²⁸ *Ibid*, at p. 434.

indemnify which subsists throughout the life of the contract, one could not extricate one duty from the other.⁷²⁹

Although the court sought to justify this approach by reference to statute⁷³⁰ which implied obligations of the duty to defend into every indemnity contract, this approach has been criticised as failing to consider the *freedom of contract* principle which overrides that presumption.⁷³¹ In effect, Riecken was arguing that the notion of freedom of contract should allow contract parties the latitude to agree to the duty to indemnify without necessarily agreeing to the duty to defend.

Even though the approach in *Crawford v Weather Shield Manufacturing, Inc* conceptualises both duties to defend and indemnify as intertwined, it inadvertently recognises that the one could exist without the other. For example, even if it is finally determined that the obligation to indemnify does not exist in a particular instance, this does not impact on the existence of the duty to defend, pursuant to which the litigation that produced the result on non-indemnification arose.

In *Flexsys America LP v XL Insurance Co Ltd*,⁷³² a case involving an American company and a UK company, which was tried in the UK as the contract was governed by English law, an important distinction between the approaches of the UK and USA courts to the duty to defend emerged. In this case, the court held that, in US jurisprudence,⁷³³ the duty to defend was broader than the duty to indemnify, and that the determination of the existence of the duty to defend is routinely made long before the duty to indemnify is established. The court found that the approach of the courts in Ohio was to find that the broader duty to defend existed, otherwise the

⁷²⁹ *Ibid*, at p. 432.

⁷³⁰ S.2778, CAL. CIV. CODE § 2778 (2009).

⁷³¹ Riecken, G. S. (2010) 'The Duty to Defend under Non-Insurance Indemnity Agreements: Crawford v Weather Shield Manufacturing, Inc and Its Troubling Consequences for Design Professionals', *Santa Clara L. Rev.*, 50, at pp. 825–892.

⁷³² (2010) Lloyd's Rep. I.R. 132; (2009) EWHC 1115.

⁷³³ Specifically, Ohio case law; see, for instance, *City of Willoughby Hills v Cincinnati Insurance Co* 9 Ohio St. 3 d 177, 180 (1984).

doctrine of *issue estoppel* would preclude it from making a finding of the existence of the narrower duty to indemnify. This is unlike English law, which does not automatically make the finding of the existence of the duty to defend in the absence of the clearly expressed intent of the parties in their contract. There is also nothing that precludes an English court from holding that the duty to indemnify exists even when the duty to defend has not been established.⁷³⁴

In *English v BGP Intern, Inc*, the courts concluded that an indemnitee was owed a separate and distinct duty to defend, whether or not the duty to indemnify ever arose. In particular, the court stated that both duties were of a different nature and rationalised this by stating that every word that is utilised in a contract ought to be given reasonable effect, especially where the meaning of the words is not ambiguous.⁷³⁵ Given the fact that both words – *defend* and *indemnify* – feature separately, the courts were able to pronounce them as being different, in effect and application.⁷³⁶ This position was recently confirmed in *Penta Corp v Town of Newport v AECOM Technical Services, Inc*,⁷³⁷ in which the court stated that an indemnitor may be in breach of contract if he refuses to honour an unambiguous duty to defend, even while the issue of ultimate culpability has not been decided.⁷³⁸

The inclusion of the duty to defend in the indemnity clause is not merely academic. This is the provision that empowers the indemnitor to decide the modalities for the appointment of counsel that will undertake the defence of the indemnitee upon the occurrence of the specified events.⁷³⁹ Thus, where the provision exists but the indemnitor fails or neglects to abide by it, he not only loses this right to counsel appointment, but could also be liable in tort.⁷⁴⁰ Furthermore, the

⁷³⁴ *Flexsys America LP v XL Insurance Co Ltd* (2010) Lloyd's Rep. I.R. 132, at paras 16 and 45.

⁷³⁵ 174 S.W.3d 366 (Tex. App.-Houston [14 Dist.] 2005, no pet. h.) at fn 6.

⁷³⁶ *E & L Chipping Co*, 962 S.W.2d at 274; *Tesoro Petroleum Corp*, 106 S.W.3d at 125.

⁷³⁷ No. 212-2015-CV-00011, 2016 N.H. Super LEXIS 7 (May 11, 2016).

⁷³⁸ *Ibid*, at pp. 12–13.

⁷³⁹ *Shell Oil Co v Khan* 138 S.W.3d 288, 298 (Tex., 2004).

⁷⁴⁰ Youngblood, D. H., Flocos, P. N. and Durocher, S. (2010), *supra*, at p. 45.

indemnitor is estopped from contesting the reasonableness of the cost of defence, neither can he refuse to bear the burden of the economic consequences arising therefrom.⁷⁴¹

While the duty to defend allows the indemnitor to appoint the defence counsel, it usually requires the indemnitee's consent to such appointment to be first sought and obtained, even though consent should not be unreasonably withheld.⁷⁴²

(iii) '*to release...*' has been approached by the UK courts as the mechanism with which parties desirous of settling a dispute reach agreement that terminates obligations *inter se*.⁷⁴³ It is the relinquishment of a right of action,⁷⁴⁴ and can also be achieved when a party covenants not to pursue a claim.⁷⁴⁵ A 'release' connotes finality, as the intention is to make a 'clean break' on the disputed issue, enabling the parties to part ways with no residual liability other than as agreed.⁷⁴⁶ A release is usually expressed as being in 'full and final settlement' of the associated claims, and the parties are entitled to assume that no further litigation would ensue pursuant to the claims so covered.⁷⁴⁷

In *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs*,⁷⁴⁸ the court held that where a release is granted to a party, this release necessarily extends to his employees and agents in respect of the same subject-matter covered by the release.⁷⁴⁹ The court's rationale is found in the thinking that if a party were allowed to proceed against an employee or agent in respect of

⁷⁴¹ *Ibid*, at p. 48.

⁷⁴² *Chanslor-Western Oil & Development Co v Metropolitan Sanitary Dist. of Greater Chicago*, 131 Ill. App. 2d 527, 266 N.E.2d 405 (1st Dist. 1970).

⁷⁴³ *Bank of Credit and Commerce International v Ali* (2002) 1 AC 251 at para 23.

⁷⁴⁴ Jones, M. A. J. (2010) *Clerk & Lindsell on Torts: Third Supplement to the Twentieth Edition*, *supra* at p. 2043, para 31– 13.

⁷⁴⁵ *Ford v Beech* (1848) 11 Q.B.D. 852, at 871.

⁷⁴⁶ *Tudor Grange Holdings v Citibank NA* (1992) Ch. 53. See also *BskyB Ltd v HP Enterprise Services UK Ltd* (formerly *t/a Electronic Data Systems Ltd*) (2010) EWHC 86 (TCC).

⁷⁴⁷ *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* (2014) EWCA Civ 1010.

⁷⁴⁸ (2015) 2 All E.R. (Comm) 747; (2015) Lloyd's Rep. I.R. 54.

⁷⁴⁹ *Ibid*, at para 72.

the same subject-matter, upon a finding of liability against the latter, they would still be entitled to be indemnified by the same principal who had settled the very same liability with the claimant.⁷⁵⁰

Likewise, where the release is given in respect of a subject-matter in which liability can be imputed to more than one party, then the release given to one party is generally regarded as releasing all the parties in respect of that subject-matter.⁷⁵¹ This is based on the common law rule to the effect that where a joint cause of action exists against two or more people, a release of one amounts to release of all.⁷⁵²

For a release to be effective, it must be unequivocal and unconditional. Where a condition is attached to the release, the courts will be unwilling to find that a release exists unless the condition has been performed. In *Deepak Fertilisers and Petrochemicals Corp Ltd v Davy McKee (London) Ltd*,⁷⁵³ the court refused to enforce a release where it was unclear that the condition precedent had been fulfilled. This requirement is consistent with the UK courts' stance on the interpretation of indemnities and exclusion clauses, to the effect that they had to be express, clear and unambiguous.⁷⁵⁴ The rationale for this is found in the courts' stance that it is implausible that a contract party will exculpate the other from liability, even when this is attributed to the latter's negligence, unless this is expressed in very clear terms. This is because, by releasing the other party, the *releasor* inevitably accepts to bear the economic consequences

⁷⁵⁰ See also *Rainy Sky SA v Kookmin Bank* (2011) UKSC 50.

⁷⁵¹ *Bryanston Finance Ltd v de Vries* (1975) QB 703, at 730.

⁷⁵² *Gladman Commercial Properties v Fisher Hargreaves Proctor* (2014) P.N.L.R. 11; see also Jones, M. A. J. (2010) *Clerk & Lindsell on Torts: Third Supplement to the Twentieth Edition*, *supra*, at p.2056, para 31-36.

⁷⁵³ (1999) 1 All E.R. (Comm) 69; (1999) 1 Lloyd's Rep. 387.

⁷⁵⁴ See, for instance, *Photo Production Ltd v Securicor Transport Ltd* (1980) A.C. 827; *Croudace Construction Ltd v Cawoods Concrete Products Ltd* (1978) 2 Lloyd's Rep. 356.

of the occurrence of the event, either wholly or *pro tanto*,⁷⁵⁵ effectively re-allocating the risk in this regard.

The attitude of UK courts to releases even for own negligence is captured succinctly in *Biffa Waste Services Ltd and Another v Maschinenfabrik Ernst Hese GmbH and Others*,⁷⁵⁶ in which the court drew a distinction between the way that UK courts approach exclusion clauses and limitation of liability clauses. The court said that the latter are construed less rigorously than the former, the rationale being that it is *inherently improbable* that a party's intention was to release the other party from liability accruing from that other party's negligence, but it is less improbable that he intended to limit it, utilising the applicable provision.⁷⁵⁷ This decision is consistent with the *ratio* in *Canada Steamship*⁷⁵⁸ and *Ailsa Craig Fishing v Malvern Fishing Co.*⁷⁵⁹

In the USA, 'release' is defined as the surrendering of all rights and obligations between contract parties,⁷⁶⁰ and entails a *releasor* relinquishing his right of action and/or to compensation if a specified wrong is committed against him, either innocently or negligently. A release differs from an indemnity, even though there has been some confusion with regards to both concepts.⁷⁶¹ For instance, it was thought that while a release extinguishes claims between the contract parties, to the exclusion of third-party claims, indemnities only apply to protect parties against third-party claims.⁷⁶² It is now clear that each concept is quite different and applies in different contexts.⁷⁶³ While a release operates as a total discharge of the released party in respect of the

⁷⁵⁵ *EE Caledonia Ltd v Orbit Valve Co Europe Plc* (1995) 1 All ER 174; (1994) C.L.C. 647 at 659.

⁷⁵⁶ (2008) P.N.L.R. 17

⁷⁵⁷ *Ibid*, at para 188.

⁷⁵⁸ (1952) 2 D.L.R. 786 (P.C.).

⁷⁵⁹ (1983) 1 WLR 964.

⁷⁶⁰ *Cox v Robison*, 105 Tex. 426, 150 S.W. 1149, 1155 (Tex.1912).

⁷⁶¹ *MG Bldg. Materials, Ltd v Moses Lopez Custom Homes, Inc* 179 S.W.3d 51, 64 (Tex.App.-San Antonio, 2005).

⁷⁶² *Wallerstein v Spirit*, 8 S.W.3d 774 (Tex. App.-Austin 1999, no pet.). See also *Derr Constr Co v City of Houston*, 846 S.W.2d 854, 858 (Tex.App.-Houston [14th Dist.] 1992, no writ).

⁷⁶³ *Dresser Industries, Inc v Page Petroleum, Inc.* 853 S.W.2d 505 (Tex. 1993).

target events,⁷⁶⁴ an indemnity exculpates a party from the economic consequences of the occurrence of the events, but does not bar the possibility of action by the indemnitee against the indemnitor.⁷⁶⁵

It is settled law that indemnity provisions in general can apply even where the parties are negligent, provided this intention is clearly expressed.⁷⁶⁶ Indeed, Springer opines that, like the obligation to indemnify, the obligation to release is subject to the *express negligence*⁷⁶⁷ principle and, unless clearly expressed in the contract between the parties, a release will be unenforceable.⁷⁶⁸ Springer reaches this conclusion based on the assumption that the policy considerations that underpin both concepts are similar enough to justify the extrapolation of the principle to apply to releases just as it applies to indemnities.⁷⁶⁹

However, as it relates to releases, a key issue is whether a release will be effective to bar an action against a party who has been grossly negligent. Given the fact that UK jurisprudence does not make the distinction between *negligence* and *gross negligence*,⁷⁷⁰ this query is resolved by reference to the US courts. In this regard, a review of the case law shows that courts have approached this issue differently. While some courts have refused to enforce releases in the face of gross negligence or intentional acts,⁷⁷¹ justified by public policy considerations,⁷⁷² other courts

⁷⁶⁴ *Hart v Traders & General Ins Co*, 189 S.W.2d 493, 494 (Tex.1945).

⁷⁶⁵ *Russell v Lemons*, 205 S.W.2d 629, 631 (Tex.Civ.App.---Amarillo 1947, writ ref'd n.r.e.).

⁷⁶⁶ See, for instance, *Goyings v Jack and Ruth Eckerd Foundation* 403 So.2d 1144.

⁷⁶⁷ The *express negligence* principle which was established in *Joe Adams & Son v McCann Constr Co*, 475 S.W.2d 721, 723 (Tex. 1971), which states that the intent to indemnify a party against its own negligence must be clear and unequivocal.

⁷⁶⁸ Springer, J. A. (1987) 'Releases: An Added Measure of Protection from Liability Comment', *Baylor L. Rev.*, 39, pp. 487–522, at p. 492.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ The current state of English law is that the distinction between negligence and *gross negligence* is *sterile and semantic*, per Lord Justice Aikens in *Springwell v JP Morgan* [2010] EWCA Civ 1221 at para 193.

⁷⁷¹ *Thomas v Atl. Coast Line R.R. Co*, 201 F.2d 167 (5th Cir. 1953); *James v Getty Oil Co* (E. Operations), 472 A.2d 33 (Del. 1983); *LaFrenz*, 172 Ind.App. 389, 360 N.E.2d 605;

⁷⁷² *Cain v Cleveland Parachute Training Cent.*, 9 Ohio App.3d, 27, 457 N.E.2d 1185 (1983); *Williams v. Chrysler Corp.*, 148 W.Va. 655, 137 S.E.2d 225 (1964); *College Mobile Home Park & Sales, Inc v Hoffman*, 72 Wis.2d 514, 241 N.W.2d 174 (1976).

have upheld contracts releasing a party from his own gross negligence.⁷⁷³ In justifying the enforcement of releases in this circumstance, the courts have held that the notion of *freedom of contract* supports this stance – subject, however, to the application of both the *contra proferentem* and *strictissimi juris* principles.⁷⁷⁴

This issue came up recently in the aftermath of the Macondo disaster. In the Transocean/BP litigation,⁷⁷⁵ the court held that the release given by BP to Transocean even for gross negligence and strict liability will be enforceable in respect of third-party *compensatory* damages claims, but will be unenforceable in respect of *punitive* damages.⁷⁷⁶ In making this distinction between compensatory and punitive damages, the court was guided by the competing principles of *freedom of contract* and *public policy*. The court acknowledged that the *freedom of contract* principle allowed the parties, who in this case, were of ‘roughly’ equal bargaining power,⁷⁷⁷ to agree to release each other from liability even for gross negligence, but public policy considerations will disallow the extension of this freedom to indemnify a party who is liable to pay punitive damages, as this will defeat the intention of the applicable statute that was breached.⁷⁷⁸ The court’s rationale was that punitive damages are meant to act as a deterrent by punishing *egregious behaviour*, and that the aim would be defeated if this burden could be avoided by contractual release.⁷⁷⁹

The conclusion can then be reached that releases that exculpate liability in the face of gross negligence will be enforceable only after due consideration of the nature of the specific event or

⁷⁷³ *Tessler & Son, Inc v Sonitrol Sec. Systems*, 203 N.J.Super. 477, 497 A.2d 530 (1985); *Valeo v Pocono Int’l. Raceway, Inc*, 500 A.2d 492 (1985).

⁷⁷⁴ *Cohen v Kite Hill Community Association* 142 Cal.App.3d 642, 191 Cal.Rptr. 209 (1983).

⁷⁷⁵ Case 2:10-md-02179-CJB-SS Document 5446, *supra*. at pp.10–19.

⁷⁷⁶ *Ibid*, at pp 18–19.

⁷⁷⁷ *Ibid*, at pp 16 – 17.

⁷⁷⁸ Clean Water Act (‘CWA’), 33 U.S.C. § 1321(b)(7). The court cited the case of *Daughdrill v Ocean Drilling & Exploration* 665 F. Supp. 477, 481-82 (E.D. La. 1987) in support of the public policy argument.

⁷⁷⁹ Transocean/BP litigation Case 2:10-md-02179-CJB-SS Document 5446, *Op.Cit* at p. 18.

breach and its likely consequences. Thus, where the event would ordinarily lead to the imposition of compensatory damages in the absence of a release, the courts would be willing to enforce the release. This would be different if the likely outcome would have been the imposition of punitive damages, as public policy considerations will prevent enforcement.

Given the fact that punitive damages are generally awarded in the US when statutes have prescribed this as the recompense for contravention of the applicable provisions,⁷⁸⁰ or in the face of egregious behaviour by a party which is not justly recompensed only by compensatory damages, parties can be guided accordingly in drafting their contracts. This distinction between compensatory and punitive damages as likely consequences of parties' action will undoubtedly feature in contracts, with the point being made that the latter will not trigger the release provisions.

In the UK, even though gross negligence is not currently recognised as a separate head of liability, it is unlikely that the courts will adopt this distinction in adjudicating on releases, even in cases in which punitive damages are awarded as expressly authorised by statute.⁷⁸¹ Where a contract party has breached a statutory provision, and seeks to avoid culpability by a contractual release, it is doubtful that the UK courts would make the distinction as marshalled in the Transocean/BP litigation. In *Persimmon Homes Ltd v Ove Arup and Partners Ltd*,⁷⁸² the court held that contractual releases will be enforced for breaches of statutory duty so long as the parties express that intent. If the contractual provisions are clear, then the courts will enforce that as being the agreed risk allocation method of the parties, and will not seek to curtail this by making the Transocean/BP litigation distinction. Importantly, the court also stated that in interpreting the release clause, the role of the *contra proferentem* principle, which requires that ambiguities

⁷⁸⁰ See, for instance, *Grimshaw v Ford Motor Co* (Ford Pinto Case), 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

⁷⁸¹ *Rookes v Barnard* (1964) AC 1129; (1964) 1 All ER 367.

⁷⁸² (2017) EWCA Civ 373.

be resolved against the contract party who proposed and sought to rely on the clause, has now been whittled down, especially between parties in equal bargaining position, as has been previously discussed.⁷⁸³ In effect, that principle is now more relevant in considering indemnities rather than exclusions and releases, and is a modification of the approach laid down in the *Canada Steamship Lines Ltd v The King*.⁷⁸⁴

(iv) ‘**to hold harmless** ...’ was once thought by the UK courts to be the obligation to prevent an indemnitee from suffering loss arising from specified events. In this regard, the cause of action only arose against the indemnitor if the indemnitee suffered loss.⁷⁸⁵ This followed the common law understanding of a *contract of indemnity*, which permitted an action for unliquidated damages only when the indemnitee could demonstrate actual loss.⁷⁸⁶ Thus, ‘hold harmless’ was conceived as part of the definition of indemnity, having no independent meaning of its own, and was simply a promise to hold the indemnitee harmless against certain losses. Indeed, the court in *Golstein v Bishop*⁷⁸⁷ seemed to tow this line when it drew this distinction:

‘...an obligation to indemnify a person against a loss (for instance, an insurer’s obligation to his insured) is a very different creature from an obligation to “indemnify” (that is to say, keep harmless) for an amount...where the person indemnified has never suffered a loss in the sense relevant to the sort of indemnity considered...’⁷⁸⁸

Clearly, the court saw ‘hold harmless’ through the prism of an ‘indemnity’, however, while indemnity *simpliciter* operates before the loss is incurred, and so was the same thing as ‘hold

⁷⁸³ See, for instance, Lord Hoffmann’s dictum in his dissenting judgment in *Bank of Credit and Commerce International v Ali* (2002) 1 AC 251 at para 62.

⁷⁸⁴ *Ibid.*, at paras 52–62. See also *K/S Victoria Street v House of Fraser (Stores Management) Ltd* (2011) EWCA Civ 904.

⁷⁸⁵ *Firma C-Trade SA v Newcastle P&I Association* (1992) 2 A.C. 1, at paras 35f–36A.

⁷⁸⁶ *Collinge v Heywood* (1839) 9 Ad. & E. 633.

⁷⁸⁷ (2017) B.P.I.R 51; (2016) EWHC 2187.

⁷⁸⁸ *Ibid.*, at para 47.

harmless’, indemnifying *against* a loss operates after the loss is incurred, and is effectively a compensation to, or restoration of, the indemnitee.

The UK Supreme Court saw things differently in *Farstad Supply AS v Enviroco Ltd*⁷⁸⁹ – a case that holds great significance for this study. At first instance, Lord Hodge stated that ‘defend, indemnify and hold harmless’ transcended indemnity *simpliciter*: it was not just the obligation to recompense, but had the effect of renouncing the right to claim any damages from the indemnitee.⁷⁹⁰ In Lord Hodge’s opinion, given the exculpatory nature of the clause, the only way for an indemnitor to protect himself from liability was to take steps to guard against it – for instance by insurance.⁷⁹¹ The Supreme Court agreed, and even though it acknowledged that the expression ‘defend, indemnify and hold harmless’ has been traditionally conceived as meaning compensation of one party for losses suffered, averred that it is wide enough to be used by a contract party as a defence to claims made by another contract party on the one hand, and to serve as an indemnity in respect of third-party claims, on the other hand.⁷⁹²

Thus, the Supreme Court concluded that ‘defend, indemnify and hold harmless’ could be regarded as an ‘*indemnity*’ *simpliciter* when it operated to determine responsibility for ‘third party exposure’, and as an ‘*exclusion*’ clause when it operated in circumstances of ‘direct exposure to the other contracting party’.⁷⁹³ In effect, the court found that shielding an indemnitee from *exposure* was different from merely indemnifying him, and that this is the effect that ‘hold harmless’ has when it is used in a contract.

⁷⁸⁹ (2010) UKSC 18, 2010 SLT 994.

⁷⁹⁰ *Farstad Supply AS v Enviroco Ltd* (2008) SLT 703, at para 26.

⁷⁹¹ *Ibid*, at para 31.

⁷⁹² *Farstad Supply AS v Enviroco Ltd* (2010) UKSC 18; 2010 SLT 994, at para 27.

⁷⁹³ *Ibid*, at para 59. See also Gordon, G. (2011), *supra*, at p. 446.

The ruling by the UK Supreme Court represents a shift in the understanding of how indemnities work because, for the first time, they can now also be considered as exclusion clauses. The immediate implication of this is the potential that these clauses may now trigger the application of the Unfair Contracts Terms Act 1977 (UCTA). This legislation establishes an anti-indemnity regime by prohibiting the limitation or exclusion of liability for death or personal injury arising from negligence,⁷⁹⁴ and subjects a limitation or exclusion clause for any other type of loss/damage arising from negligence to the reasonableness test.⁷⁹⁵ Given that this is the very type of liability that indemnity clauses in oil and gas contracts seek to regulate via risk allocation, the likelihood that they may be subjected to the restrictions and conditions in the UCTA is high. The rationale for this statement is explained below.

However, there is a view that the UCTA's application may not have the damning effect postulated, especially as it concerns personal injury, as 'neither contracting party will have corporeal bodies to injure ...'.⁷⁹⁶ From this perspective, episodes of personal injury will not qualify as 'direct exposure to the other contracting party', and so will not be considered as an exclusion clause, thereby negating the trigger of the UCTA's application. This study questions this submission, as there is no indication from the Supreme Court's ruling that 'direct exposure to the other contracting party' should be interpreted in such a restrictive manner. Indemnities and exclusion clauses, by their very nature, seek to allocate risk, *inter alia*, for death, personal injury or property damage. This means that the sufferers of the events can sometimes be human entities – *especially with respect to death and personal injury* – and not corporate entities, even though the protection is given at the corporate level to the contracting entity. Besides, it is settled law that, even though a company has corporate personality and is separate and distinct from its

⁷⁹⁴ Section 2(1).

⁷⁹⁵ Section 2(2)(3).

⁷⁹⁶ Gordon, G. (2011) 'Contribution, Indemnification and Exclusion: Farstad in the Supreme Court', *Edinburgh L. Rev.*, 15, pp. 259 – 265, at p. 265.

shareholders, directors, officers, and employees,⁷⁹⁷ it must still carry out its business through human agents.⁷⁹⁸ Indeed, it is always the death or injury of the employee or officer of the company that forms the basis of the action to establish liability and determine risk allocation, just as it is the same acts of the employee that give rise to vicarious liability. It is, therefore, not unthinkable that an interpretation of “direct exposure to the other contracting party” may refer to the human agents of the contracting party, and not the corporate entity.

If the above scenario occurs, then it is possible that the potential application and impact of the UCTA will be more real and probable, with the attendant consequence of excluding liability for own negligence in the indemnity structures of most offshore oil and gas contracts, including offshore drilling contracts. Judicial pronouncement on this issue is required to give clarity to the status of exclusion clauses in drilling contracts vis-à-vis the extent and reach of the UCTA 1977. This clarity will end the speculation on this subject, evidenced by the different opinions thereto, and infuse certainty in transactions, which in turn enhances the quality of commercial engagements between the parties.

From a US perspective, to ‘hold harmless’ is to take responsibility for all expenses necessary for the defence of a claim, and wholly to recompense a party for what he has lost or expended.⁷⁹⁹ The understanding of this concept has not been without controversy, as courts have approached it differently. In *Mays v Pierce*,⁸⁰⁰ the court held that ‘hold harmless’ was identical to a *release*, but this approach has been disputed and disapproved by other courts.⁸⁰¹ Indeed, the court held,

⁷⁹⁷ *Salomon v Salomon & Co Ltd* (1987) AC 22, HL.

⁷⁹⁸ *Halborg v EMW Law LLP* (2017) EWCA 793, at para 46.

⁷⁹⁹ *Bank of El Paso v. Powell* 550 S.W.2d 383, 385 (Tex.Civ.App. 1977).

⁸⁰⁰ 203 S.W.3d 564 (Tex.App.-Hous. (14 Dist.) Sep 26, 2006) (NO. 14-05-00742-CV).

⁸⁰¹ See, for instance, *Hart v Traders & General Ins Co*, 189 S.W.2d 493, 494 (Tex.1945); *Cox v. Robison*, 105 Tex. 426, 150 S.W. 1149, 1155 (Tex.1912).

in *MG Bldg Materials, Ltd v Moses Lopez Custom Homes, Inc*, that ‘hold harmless’ was not a release, but was akin to the duty to indemnify.⁸⁰²

In likening the obligation to hold harmless to the duty to indemnify, courts in Canada have held that “hold harmless” is basically the duty to *indemnify from liability*, which encompasses an obligation to pay in advance, monies to cover expenses and costs for a specified liability to the relevant indemnitee, as soon as the amount is determined, effectively saving the indemnitee from paying for same, and then seeking re-imbursement by the indemnitor.⁸⁰³ In adopting this approach, the courts here are essentially distinguishing an indemnitor’s responsibility to protect the indemnitee from *liability* or just from *damages*. Thus, ‘hold harmless’ in respect of *damages* will recompense the indemnitee for any imposed damages, fines, costs and the like only *after* he has paid the charge⁸⁰⁴. In respect of *liability*, ‘hold harmless’ implies that the indemnitee is entitled to protection from even incurring the liability, the latter becoming payable by, and enforceable against the indemnitor as soon as the exposure crystallises.⁸⁰⁵

In Canada, the courts have provided some clarity on the distinction between *hold harmless* and *save harmless*, which had caused some confusion within that jurisdiction. It was initially thought that these two terms had different implications, but the courts have clarified that these mean the same thing and can be used interchangeably.⁸⁰⁶ Thus, it is clear that the real confusion is between the obligation to hold harmless and the duty to indemnify. Canadian jurisprudence has not quite delineated the boundaries between both concepts; indeed, commentators have questioned the

⁸⁰² 179 S.W.3d 51, 64 (Tex.App.-San Antonio, 2005). See also *Paniaguas v Aldon Companies, Inc*, 2:04-CV-468-PRC, 2006 WL 2788585 (N.D. Ind. Sept. 26, 2006); *Consult Urban Renewal Dev Corp v T.R. Arnold & Assoc., Inc.*, CIV A 06-1684 WJM, 2007 WL 1175742 (D.N.J. Apr. 19, 2007).

⁸⁰³ *Stewart Title Guarantee Co v Zeppieri*, [2009] O.J. No. 322 (S.C.J.) per the Ontario Superior Court.

⁸⁰⁴ *Holland v Fidelity & Deposit Co of Maryland*, 623 S.W.2d 469, 470 (Tex.App.-Corpus Christi 1981).

⁸⁰⁵ *Tubb v Bartlett*, 862 S.W.2d 740, 750 (Tex.App.-El Paso 1993; *Ingersoll-Rand Co v Valero Energy Corp.* 997 S.W.2d 203, 207 (Tex., 1999).

⁸⁰⁶ *Williamson v Guitard* (1993), 134 NBR (2d) 305 at para 7 (QB); *Excelsior Life Insurance Co v Saskatchewan* (1987), 63 Sask R 35 at paras 4, 6 (QB).

additional obligation that *hold harmless* imposes, and as to whether this is only limited to protecting the indemnitee from the burden of defence costs.⁸⁰⁷ Given this uncertainty, they advise potential indemnitors to avoid using this expression until there is greater clarity in this area of law.⁸⁰⁸

This uncertainty has caused some commentators to call for the total excision of the verbiage from contracts. Adams opines that the use of the phrase ‘hold harmless’ is both redundant and pernicious and proposes drafting verbiage that just says ‘indemnify’.⁸⁰⁹

It is doubtful that Adams’ opinion will be given serious attention by contract parties given the fact that the distinction between the duty to indemnify and the obligation to hold harmless has been accepted by courts in the UK and the USA, and so represents the current state of legal jurisprudence in these jurisdictions. Although there are still debates about the meaning, scope and extent of this distinction,⁸¹⁰ a contract party might be doing himself a disservice if these provisions are not reflected in their contract, especially if the objective is indeed to ensure the assumption of responsibility for the overarching liability of the indemnitee as against just the damages, in which case compensation will always happen after the fact.

(b) ‘... arising from, relating to or in connection with the performance or non-performance of the CONTRACT’

⁸⁰⁷ Kangles, N., Rogers, R. B., Allidina, Z. and Harris, C. (2011) ‘Risk Allocation Provisions in Energy Industry Agreements: Are We Getting It Right?’, *Alta. L. Rev.*, 49, pp. 339 – 367, at p. 352.

⁸⁰⁸ *Ibid*, at p. 367.

⁸⁰⁹ Adams, K. (2012) ‘Revisiting “Indemnify”’, *Adams on Contract Drafting*. Available at: <http://www.adamsdrafting.com/revisiting-indemnify/> accessed 20 February 2017.

⁸¹⁰ For instance, the argument that Gordon makes on whether the UK Supreme Court’s decision in *Farstad Supply AS v Enviroco Ltd* will not trigger the application of the reasonableness test in line with the Unfair Contract Terms Act 1977, since the court stated that indemnity and hold harmless clauses can sometimes operate as exclusion of liability clauses: Gordon, G. (2011) ‘Risk Allocation in Oil and Gas Contracts (Chapter 14)’, in Gordon, G., Paterson, J. and Usenmez, E. (eds) *Oil and Gas Law: Current Practice and Emerging Trends*. Dundee: Dundee University Press, pp. 443– 497, at p. 446.

For indemnities to apply, the death, injury or loss must have occurred in circumstances that can be attributed to the activities carried on within the contract. The words with which this relationship between the infraction and the contract are expressed is a matter of choice for the contract parties, however, they must be clear and wide enough to capture the essence of condition-precendent to the triggering of the indemnity. In *Smith v South Wales Switchgear*,⁸¹¹ the court stated that the expression ‘arising out of, or in the course of, or by the execution of this order’ could only be interpreted as meaning the actual doing of the work authorised by the order.⁸¹² In line with this interpretation, the court denied indemnity cover to the indemnitee based on the rationale that the obligation to indemnify had to be linked with the actual work required to be carried out – that is, the scope of work, and not just to the other contract activities.⁸¹³

However, this *ratio* was distinguished in *Shaun Campbell v Conoco (UK) Ltd, Amec Process and Energy Limited, Salamis SGB Ltd*,⁸¹⁴ in which the court held that the decision in *South Wales Switchgear* turned on its own facts and depended on its own context and provisions.⁸¹⁵ In considering the meaning of ‘... arising from, relating to or in connection with the performance or non-performance of the contract’, it was argued by the indemnitor that the expression ‘in connection with’ narrowed the interpretation of the whole provision. The indemnitor opined that this expression required a nexus to be established between the injury that ensued and the actual work to be done under the contract, just like it had been decided in *South Wales Switchgear*.⁸¹⁶ The indemnitor contended that the use of ‘in connection with’, together with the wider expression ‘regardless of the cause or the reason therefore ...’ served to narrow the liability giving rise to indemnity to the actual performance of the scope of work of the contract.⁸¹⁷

⁸¹¹ (1978) 1 WLR 165.

⁸¹² *Ibid*, at 169 and 173.

⁸¹³ *Ibid*, at 169.

⁸¹⁴ (2002) EWCA Civ 704.

⁸¹⁵ *Ibid*, at para 26.

⁸¹⁶ *Ibid*, at para 10.

⁸¹⁷ *Ibid*, at para 18.

The court rejected this argument, stating that there was no justification for the ‘strained or artificially restrictive interpretation’ on ‘... arising from, relating to or in connection with the performance or non-performance of the contract’, as the latter sentence is wide enough and sufficient to establish the relationship between the injury and the liability.⁸¹⁸ In support of this position, the court referred to the *ratio* in *EE Caledonia Ltd v Orbit Valve Co Europe Plc*,⁸¹⁹ in which the court held that an employee who was on board the Piper Alpha platform, but was asleep when the explosion in which he lost his life occurred, was within the contemplation of the clause ‘resulting from or in any way connected with the performance of this order’, and so was qualified to be indemnified.⁸²⁰ That court also criticised the decision in *South Wales Switchgear* as being too restrictive, stating that the entire clause had to be given its natural meaning, which in the specific context being considered did not lead to any absurdity or exposure to unreasonable liability.⁸²¹

In interpreting this part of the indemnity clause, the courts have, again, affirmed the emphasis on the clarity of the language of the contract in discerning the intent of the parties. Just like the principles guiding the interpretation of indemnities and exclusion clauses, the courts would normally construe them narrowly especially when the language is clear and the interpretation would not lead to absurdity or defeat the business efficacy of the contract.⁸²² However, very recently, in *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd (formerly Chartis Insurance UK Ltd)*,⁸²³ the UK Supreme Court clarified that this narrow interpretation of

⁸¹⁸ *Ibid*, at para 18.

⁸¹⁹ (1995) 1 All ER 174.

⁸²⁰ *Shaun Campbell v Conoco (UK) Ltd, Amec Process and Energy Ltd, Salamis SGB Limited* (2002) EWCA Civ 704, at para 26.

⁸²¹ *EE Caledonia Ltd v Orbit Valve Co Europe Plc* (1995) 1 All ER 174, at paras 233H–234E.

⁸²² *Tektrol Ltd (formerly Atto Power Controls Ltd) v International Insurance Co of Hanover Ltd* (2006) 1 All ER (Comm) 780.

⁸²³ (2017) A.C. 73.

indemnity and exclusion clauses would only apply to clauses ‘excluding or limiting a legal liability arising by operation of law’, for instance excluding liability for own negligence or when the law implies the existence of a contract, otherwise, the clause would be interpreted in the context of all the relevant terms of the contract.⁸²⁴ Thus, it would be correct to conclude that the clause ‘ ... arising from, relating to or in connection with the performance or non-performance of the contract’ will continue to be interpreted within its wider context as enunciated by the court in *Shaun Campbell*.

(c) ‘ ... loss of or damage to the property of any *third party* ...caused by negligence or breach of duty (whether statutory or otherwise)’

Blackacre would typically enter into several contracts to prosecute the drilling campaign, as different skills set and equipment are required at different stages of the programme. This would inevitably involve many people working on the rig simultaneously and at different times too. To protect themselves, Blackacre indemnifies Whiteacre, and holds them harmless in respect of death, personal injury or property damage to their (Blackacre’s) employees, and Whiteacre reciprocates this gesture by providing the same indemnities to Blackacre in respect of their (Whiteacre) own employees *and* subcontractors at all levels.⁸²⁵ This indemnity structure is explained in detail in the next section, but suffice it to say that an indemnity scheme exists which extends the indemnity cover to each contract party’s affiliates, parents, subsidiaries, subcontractors, officers, directors, shareholders and employees.⁸²⁶ These classes of people respectively form the *Company Group* and *Contractor Group*.⁸²⁷

⁸²⁴ *Ibid*, at p.79, para 7.

⁸²⁵ Gordon calls this the *anterior* contract - Gordon, G. (2011) ‘Risk Allocation in Oil and Gas Contracts (Chapter 14)’, in Gordon, G., Paterson, J. and Usenmez, E. (eds) *Oil and Gas Law: Current Practice and Emerging Trends*. Dundee: Dundee University Press, pp. 443–497, at p. 456.

⁸²⁶ Moomjian, C. A. (1999) ‘Contractual Insurance and Risk Allocation in the Offshore Drilling Industry’, *Drilling Contractor*, January/February at p. 20.

⁸²⁷ *Ibid*, at p. 20.

Third parties are not part of the *Company Group* or *Contractor Group*, even though it is recognised that the activities under the contract could impact them negatively. Again, for these purposes, there are two classes of third parties. As previously discussed in the bedrock section, the first class is made up of *visitors* and the *trespassers*, the former being legitimately invited to the oilfield by Blackacre, and could be *contractors*,⁸²⁸ *invitees*⁸²⁹ or *licensees*,⁸³⁰ while the latter – a *trespasser* – was an unwanted intruder, or an *invitee* who had overstayed his welcome.

Although *contractors* should be part of the indemnity structure alluded to above, sometimes, the terms of the contract between Whiteacre and their subcontractor who are lower down the contractual chain do not go far enough. Even if they did, and all the contracts embody identical indemnity provisions, the contractor employees are still ‘third parties’ from the perspective of the other contractors, and theoretically, nothing stops them from suing the errant contractor or Blackacre when harm ensues. The only recourse here for Blackacre is that they can call on the indemnity structure with Whiteacre or the employee’s employer to indemnify them (Blackacre) of the cost of settling the action brought by the harmed employee. To avoid this circularity, the employee’s employer absorbs the cost in line with the indemnity structure. Furthermore, the parties could also define ‘third party’ in their contract as any party who is neither a member of *company group* or *contractor group*, making it clear that the remedy of an injured employee will be situated within the indemnity structure.

The second group of third parties are innocent bystanders or passers-by who are close enough to the contract activity *locus* as to be impacted by it. Protection of these third-party interests is

⁸²⁸ A person with whom the occupier had a contractual relationship, and who entered the premises pursuant to, or in connection with, the performance of the contract.

⁸²⁹ A person with whom the occupier had a mutual business or interest, and who is on the premises in pursuance of that interest.

⁸³⁰ A person who is invited to the premises in satisfaction of his own interest, or mutual interest not of a business nature.

founded on the law of tort and is justified by the duty of care which is owed to persons.⁸³¹ The issue then is, who bears the responsibility for the economic consequences of the occurrence of any event which causes harm to this group of people, and to what extent?

As stated in Chapter 3, liability was based on *negligence*, in general, more specifically on the rule in *Rylands v Fletcher*,⁸³² and usually allocated based on the traditional fault regime. Parties who have caused the harm to ensue would typically bear the responsibility for the economic consequences of the occurrence the harm, and indemnify the other party for the ensuing harm accordingly.⁸³³ The fault would usually lie where it fell, and the default risk allocation by law will not be altered. Given the fact that Whiteacre remain responsible for the consequences of their own negligence as far as liability to third parties is concerned, they can mitigate their exposure by limiting it, either to the amount of monies paid under the contract or the limit of the cover provided by insurance.⁸³⁴ In this regard, the contract can then provide that any excess above the specified limits would be covered by Blackacre. As always, this intent would have to be clearly stated, without any ambiguity otherwise the courts will not enforce it, as the clause would be interpreted narrowly.⁸³⁵ In *WesternGeco Ltd v ATP Oil & Gas (UK) Ltd*,⁸³⁶ the court declined to enforce a clause that provided that the claimant's 'liability under this contract' was limited to the total aggregate of the monies received by them under the contract and required the defendant to pay the excess over and above that. As discussed earlier, the court's rationale was that the wording of the relevant provision in the contract did not quite convey that intent, and the

⁸³¹ This is based on the 'neighbour principle' formulated in *Donoghue v Stevenson* (1932) AC 562.

⁸³² (1865) 3 H. & C. 774 (Court of Exchequer).

⁸³³ Moomjian, C. A. (1999) 'Contractual Insurance and Risk Allocation in the Offshore Drilling Industry', *Drilling Contractor*, March/April at p. 14.

⁸³⁴ *Ibid*, at p.15.

⁸³⁵ *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd (formerly Chartis Insurance UK Ltd)* (2017) A.C. 73.

⁸³⁶ (2006) 2 All ER (Comm) 637; (2006) 2 EWHC 1164 (Comm).

circumstances of the subject loss were such that it was disputable that it was a ‘liability under this contract’.⁸³⁷

The fault-based risk allocation regime in which the wrongdoer bears the responsibility for the economic consequences of the harm caused to third parties seems like a fair way of resolving third party liabilities, unless it has been alleged that both parties contributed to the negligence that caused the harm. In this regard, it becomes onerous and time consuming to determine, first the culpability of each party, and then the degree of negligence of either party, as well as the associated contribution required. It was for this very reason, to avoid the tedium associated with this fault-finding exercise, that contract parties chose to allocate risk on a knock-for-knock basis, so the process of determining contributory negligence in this circumstance totally defeats the mutual indemnity risk allocation regime.

Even though there is nothing that prevents the parties from deviating from the traditional liability regime in respect of third parties, and actually allocate responsibility for third-party liabilities to one party or the other, the crucial issue is whether the third party can enforce the clause detailing that allocation. Where applicable, this category of people may rely on the common law principle of *jus quaesitum tertio* to the effect that a third-party beneficiary to a contract may be able to sue on it and enforce that interest. This is contrary to the doctrine of *privity of contracts* which states that only parties to a contract may sue and be sued on it. In the UK, they are also afforded statutory protection under the Contracts (Rights of Third Parties) Act 1999; even though the protection is limited by qualifications that may nullify the real effect of the reprieve supposedly granted. This issue is more fully discussed in the section on the Contracts (Rights of Third Parties) Act 1999.

⁸³⁷ *Ibid*, at paras 28–29.

(d) ‘ ... All exclusions and indemnities ...shall apply irrespective of cause and notwithstanding the negligence or breach of duty (whether statutory or otherwise) of the indemnified party or any other entity or party and shall apply irrespective of any claim in tort, under contract or otherwise at law’

The philosophical basis for the departure from the fault-based risk allocation regime in which the wrongdoer bears the economic consequences of the occurrence of his wrongful act in contract needs to be restated. The complexity and high risk of the extractive industries in general, and offshore drilling in particular, make it inevitable that different skills set and equipment from different people would be required and deployed during a drilling campaign. This complexity is worsened when scarce resources, including time and money, are expended on litigation and investigations designed to determine cause, negligence and culpability which then aid in identifying the wrongdoer, and allocating the responsibility of bearing the economic consequences of the wrongful act accordingly.⁸³⁸ Furthermore, the fault-based risk allocation regime leaves parties practically insuring for all sorts of eventualities, because they do not know which risk is going to eventuate due to their negligence or other cause, with the attendant cost of insurance premia, which is ultimately internalised in the contract price, escalating it unnecessarily.⁸³⁹

With the increased complexities and risks in drilling contracts, parties have had to focus on mechanisms for allocating risks in a simplified manner that achieves their individual contract objectives, while ensuring that specific risks are known to, and assumed by, parties best suited to manage them, all relevant factors considered. Essentially, this entailed changing the default risk allocation method that bears the fault element, in preference for one in which fault,

⁸³⁸ Aubin, Y. and Portwood, T. (2001) ‘Mutual Indemnity and Hold Harmless Agreements’, *International Business Law Journal*, pp. 671– 698, at p. 676.

⁸³⁹ *Ibid*, at p. 677.

howsoever occasioned, was irrelevant. This meant that parties could still be indemnified and held harmless even if they had been negligent as a result of which the other party suffers harm. Provided that this intent is clearly and unambiguously expressed by the parties, the courts will uphold and enforce indemnification for own negligence.⁸⁴⁰

Courts, have however, tried to draw distinctions between ‘negligence’, ‘gross negligence’ and ‘wilful misconduct’, trying to narrow the scope of the liability regime instituted by contract parties. Unlike the US system, UK jurisprudence does not generally categorise negligence into different degrees in line with perceived seriousness of the ensuing harm. Although there have been debates as to whether it should,⁸⁴¹ the current state of the law is that the distinction between negligence and *gross negligence* is *sterile and semantic*⁸⁴² (emphasis added). However, another school of jurisprudence that seeks to give meaning to ‘gross’ seems to be emerging in the UK. In *Camarata Property Inc v Credit Suisse Securities (Europe) Ltd*,⁸⁴³ Mr. Justice Andrew Smith rejected an argument that there was no distinction between ‘negligence’ and ‘gross negligence’, stating that the relevant enquiry was not whether the latter was known to English law, but what the parties intended it to mean.⁸⁴⁴ Even though he accepted that the distinction between the terms is one of degree and not of kind, he opined that the parties must have intended it to mean something ‘more fundamental than failure to exercise proper skill and/or care constituting negligence’.⁸⁴⁵ On this basis, and in line with the ‘conventional English law principles of

⁸⁴⁰ *EE Caledonia Ltd v Orbit Valve Co Europe Plc* (1995) 1 All ER 174. See also Moomjian, C. A. Jnr. (1999) ‘Contractual Insurance and Risk Allocation in the Offshore Drilling Industry’, *Drilling Contractor*, May/June, at p. 26 where he stated that the clear expression of indemnification for own negligence is called ‘Talismanic language’ or ‘magic words’ that enable the indemnity to be enforced.

⁸⁴¹ See, for instance, *Tradigrain SA v Internek Testing Services*, [2007] EWCA Civ 154 at para 23, Moore-Bick LJ observed that ‘The term “gross negligence”, although often found in commercial documents, has never been accepted by English civil law as a concept distinct from civil negligence...’. However, Deakin *et al* have questioned the lack of distinction between the two concepts, especially where a defendant’s conduct is ‘not just bad, but repeatedly bad’: Deakin, S., Johnston, A. and Markesinis, B. (2012) *Markesinis and Deakin’s Tort Law*. Oxford University Press, at p. 27.

⁸⁴² Per Lord Justice Aikens in *Springwell v JP Morgan* (2010) EWCA Civ 1221 at para 193.

⁸⁴³ (2011) EWHC 479.

⁸⁴⁴ *Ibid*, at para 161.

⁸⁴⁵ *Ibid*, at para 161.

construction’, the court required the claimant to demonstrate more than mere negligence on the part of the defendant before liability could be established.⁸⁴⁶

Wilful misconduct also has the effect of risk allocation (or re-allocation) when it is established to have occurred. In *Forder v Great Western Railway Co*, this term was held to be the intentional wrongdoing by a party who knowingly does it and persists in doing this without any thought or care as to consequences.⁸⁴⁷ However, contract parties can choose to indemnify and hold harmless any party who is allegedly liable for wilful misconduct. Again, this intent needs to be clearly expressed in their contract.⁸⁴⁸ In some offshore drilling contracts, where wilful misconduct is established, it could make Blackacre or Whiteacre vicariously liable for the acts of their senior supervisory personnel.⁸⁴⁹ These circumstances have been discussed in Chapter 3.

Although Cameron argues that this traditional risk allocation mechanism is now being challenged post-Macondo,⁸⁵⁰ this study respectfully disagrees as there is no evidence that any such change to the risk allocation regime has occurred, neither has any viable alternative which is acceptable to all parties been proposed. He further states that, as operator, Blackacre are on the frontline; they interfaced with government regulators to obtain the relevant permits, were particularly favoured by the risk – reward balance in the project, evidenced by the structure of the contract, obviously with deeper pockets and so were the party best able to bear the economic consequences of the occurrence of a catastrophic event.⁸⁵¹ These apparent advantages over Whiteacre have, however, not prevented Blackacre from seeking to allocate the responsibility for bearing the economic consequences of the occurrence of a catastrophic event to Whiteacre,

⁸⁴⁶ *Ibid*, at para 162.

⁸⁴⁷ (1905) 2 KB 532, at 535–536.

⁸⁴⁸ *De Beers UK Ltd v Atos Origin IT Services* (2010) EWHC (TCC).

⁸⁴⁹ See, for instance, Art 4.6, AIPN Model International Operating Agreement 2002.

⁸⁵⁰ Cameron, P. D. (2012) ‘Liability for Catastrophic Risk in the Oil and Gas Industry’, *International Energy Law Review*, 6, at pp. 207–219.

⁸⁵¹ *Ibid*, at pp. 207–210.

as was the situation in the *Macondo* case. Here, BP sought not only to enquire into the cause of the pollution, but also to impose liability on Transocean and Halliburton in circumstances in which conventional indemnities-based risk-allocation methods would have presumed that BP would assume liability.⁸⁵²

The foregoing makes it imperative that contract parties must take steps to express their intent more clearly and unequivocally in their contract. Indeed, some commentators take the view that there seems to be evidence of ‘judicial hostility’ to the enforcement of indemnity and exemption clauses, prompting the call for contract parties to consider spelling out every possible head of liability which they seek to indemnify and exclude from culpability, including ‘recklessness and wilful default’.⁸⁵³ This is aside from the conventional exclusions of own negligence, breach of contract and/or statutory duty. Although the advice may seem pedestrian, it remains at the heart of the approach that the courts have consistently taken in interpreting and enforcing indemnity and exemption clauses.

4.1.2 Indemnities and Mutual Hold Harmless

The exploration and production of hydrocarbons from the North Sea in the 1960s witnessed the incorporation of the mutual indemnity structure from insurance contracts into the drilling contract. Also known as *knock for knock* or *mutual hold harmless*,⁸⁵⁴ it meant that each contract

⁸⁵² *Ibid.*, at p. 210.

⁸⁵³ Warne, P. and Westbrook, B. (1994) ‘Indemnity Clauses: Need for Clear Wording’, *International Insurance Law Review*, 2(8), pp. 129–131, at p. 131.

⁸⁵⁴ There seems to be some confusion as to the origins of the knock-for-knock principle, even though there is unanimity of opinions that it arose from the insurance industry in the early 20th century. One version states that it arose in the context of sea-going vessels that travelled together during the Second World War, and were accustomed to knocking into each other, given their physical closeness to one another. Given the challenge in determining the offending vessel, with the attendant cost and duration of the resulting investigations and litigation, insurance companies had to resort to a no-fault regime in which everyone bore their own losses. The insurance companies not only dispensed with the need for laborious investigations, but also waived their right to recourse against the insurance companies of the liable vessels. The second version rehashes the same reasons as given herein, but in respect of motor vehicles. The justification was that the cost and tedium involved in investigations and litigation far

party agreed to indemnify the other in respect of liabilities arising from injuries – including death and disease – to their own personnel, and loss of or damage to their own property, including own consequential losses, but excluding losses and claims from third parties.⁸⁵⁵ Compared with the unilateral indemnity offered only by Blackacre to Whiteacre, the mutual indemnity structure presents a platform through which parties could distribute liability efficiently.⁸⁵⁶ In this context, efficiency stems from the fact that both parties reduce transactional costs by obtaining optimum insurance against their own specific risks, can better evaluate their risk profile and, by extension, optimise their total capital outlay. Efficiency is also achieved because of the mutual allocation of risks to parties who are best able to manage them.⁸⁵⁷

Although the knock-for-knock indemnity structure is produced by contract parties, it has been judicially noticed by the courts within the context of offshore drilling contracts. In *Caledonia North Sea Ltd v London Bridge Engineering Ltd*,⁸⁵⁸ the court accepted this as industry practice which was known to, and accepted by, the courts.⁸⁵⁹ In justifying this position, the court approached the mutual indemnity structure, not just as a risk allocation mechanism, but also as a tool through which the real intentions of the contract parties could be discerned, and upheld, especially when the wording of the indemnity provisions is clear and unambiguous.⁸⁶⁰

Given the large number of services and associated contractors required to prosecute a drilling campaign, the mutual indemnity between Blackacre and Whiteacre is not far reaching enough to

outstripped whatever benefits that process produced, and that the reduced cost of insurance attendant upon the elimination of multiple covers for the same risks, was a more worthwhile, sensible and cost-effective option.

⁸⁵⁵ Andrade, M. M. (2011) 'Knock for Knock Indemnities: Contract Practices and Enforceability Issues', *Oil, Gas & Energy Law Intelligence*, 9(6), at p. 4.

⁸⁵⁶ *Ibid*, at p. 3.

⁸⁵⁷ Hearn, B., 'The Canadian Institute's Legal & Business Guide to Public Procurement', (2004) *Allocating and Managing Procurement Risks* Toronto, Canada: McMillan Binch LLP, at p. 32.

⁸⁵⁸ (2002) UKHL4; (2002) 1 Lloyd's Rep 553, HL. This was one of the cases that arose in the aftermath of the 6 July 1988 catastrophe in the North Sea in which an oil and gas platform, *Piper Alpha*, was impacted by explosion that led to the death of 167 people.

⁸⁵⁹ *Ibid*, at para. 10.

⁸⁶⁰ *Ibid*, at para. 43. See also *Smit International (Deutschland) v GmbH Josef Mobius* (2001) CLC 1545, in which Morrison J. described the knock-for-knock principle as a 'crude but workable allocation of risk ...'.

ensure adequate cover of all the eventualities that could occur on the oilfield. In effect, the primary contract parties could still be left bearing the residual economic consequences of the occurrence of events occasioned by their subcontractors or other invitees to the oilfield. In the absence of an indemnity structure that traverses the entire service chain, the mutual indemnity between Blackacre and Whiteacre defeats the very purpose for which it was structured. This is why the ‘*inurement*’ provision was introduced, which extends the indemnity cover to each contract party’s affiliates, parents, subsidiaries, subcontractors, officers, directors, shareholders and employees.⁸⁶¹ These classes of people respectively form the *Company Group* and *Contractor Group*⁸⁶² and, although they are not contract parties, they are entitled to the same indemnity benefit as the contract parties. Indeed, the Contracts (Rights of Third Parties) Act 1999 enables them to enforce this benefit as named beneficiaries in the contract. A full discourse on this legislation is detailed in the following sections in this chapter.

Despite the enlargement of the class of protected persons, there was still a gap in the indemnity cover, as the contract parties may still be exposed to liability arising from acts of subcontractors down the service chain on both sides, given the fact that there is no privity between the contractors. The *industry mutual hold harmless* (IMMH) scheme was developed to address this challenge in respect of venturers in the UK Continental Shelf. This scheme, which was developed by LOGIC,⁸⁶³ created the basis for *back-to-back* indemnities, and was based on a Deed of Adherence to which contractors in the offshore oil sector signed up.⁸⁶⁴

⁸⁶¹ Moomjian, C. A. Jnr. (1999) ‘Contractual Insurance and Risk Allocation in the Offshore Drilling Industry’, *Drilling Contractor*, January/February at p. 20.

⁸⁶² Youngblood, D. H., Flocos, P. N. and Durocher, S. (2010) ‘Risk Transfer Provisions in Commercial Contracts: Strategies for Negotiating Indemnity, Insurance and Limitation of Liability Clauses’, *Strafford* Available at: <http://www.straffordpub.com>; accessed 10 February 2017), at p. 21.

⁸⁶³ Leading Oil and Gas Industry Competitiveness (UK), operates as the custodian for cross-industry projects that aim to increase the efficiency of working practice in the United Kingdom Continental Shelf (known as the UKCS), <http://www.logic-oil.com/>.

⁸⁶⁴ <http://www.logic-oil.com/imhh>. This scheme was introduced on 1 July 2002 for an initial 10-year tenor that expired on 31 December 2011. It is currently in its second 10-year period which will elapse on 31 December 2022.

This Deed creates a contractual nexus between the contractors, and suffices to extend the indemnity structure between and among themselves, by which they respectively agree to be responsible for liabilities arising from injuries – including death and disease – to their own personnel, and loss of, or damage to, their own property, including own consequential losses, and extends this to the classes of people who form their respective *Contractor Groups*. The Deed applies only to personal injury, property loss or damage and consequential losses. Risks such as pollution are not covered even though they were considered, but were excluded as they were thought to be less quantifiable and potentially complicated. The focus on property, personnel and consequential loss is based on the thinking that a signatory is best positioned to evaluate applicable risks and arrange requisite insurance as required.

The IMHH covered only offshore activities, and onshore activities were excluded, as the framers posited that extending cover to onshore activities could potentially lead to situations in which it would apply to unintended circumstances (such as motor vehicle accidents), thereby creating avoidable ambiguity.⁸⁶⁵ Thus, where a signatory had a project with both onshore and offshore components, the IMMHH only applied to all signatories engaged in the latter. However, nothing prevented two or more signatories from entering into a separate mutual hold harmless agreement to cover onshore risks.

How the deed works in practice is instructive. Blackacre and Whiteacre enter into a drilling contract in which Blackacre indemnifies Whiteacre, and holds them harmless in respect of death, personal injury or property damage to their (Blackacre) employees, and Whiteacre provides the same assurances to Blackacre in respect of their (Whiteacre) own employees *and* subcontractors

⁸⁶⁵ <http://www.logic-oil.com/imhh/general-guidance>

at all levels.⁸⁶⁶ In this regard, both parties assume responsibility for the economic consequences of any losses arising from the specified events, to the classes of people mentioned in the indemnity clause.

Similarly, where Whiteacre then enters into a contract with their subcontractor, both parties also agree to indemnify and hold harmless each other in respect of their respective personnel; in addition, Whiteacre also assumes the risk in respect of Blackacre's personnel, while the subcontractor agrees to be responsible for the losses incurred by their own subcontractors, that is, Whiteacre's sub-subcontractors, at all levels.⁸⁶⁷ When the indemnity given by the subcontractor to Whiteacre is placed in context, it has the effect of moderating the indemnity that Whiteacre gave to Blackacre, effectively restricting Whiteacre's liability to losses incurred by their own employees. This is brought about by the fact that Blackacre's contract with Whiteacre already recites that both parties will be responsible for the members of their respective *Groups*, and so if Whiteacre's contractor gives Whiteacre the same indemnity which recites that both parties – Whiteacre and contractor – will be responsible for the members of their respective *Groups*, this effectively means that each party – Blackacre, Whiteacre and contractor – will bear the economic consequences of the occurrence of any adverse event to members of their respective *Groups*. Thus, even though Whiteacre had covenanted to Blackacre to be responsible for members of their *Group*, those members end up being responsible for themselves, thereby moderating the covenant made to Blackacre in the anterior contract.

The contract between the subcontractor and the sub-subcontractor would entail both parties assuming the responsibility for their respective employees, with the subcontractor also assuming

⁸⁶⁶ Gordon calls this the 'anterior' contract: Gordon, G. (2011) 'Risk Allocation in Oil and Gas Contracts (Chapter 14)', in Gordon, G., Paterson, J. and Usenmez, E. (eds.) *Oil and Gas Law: Current Practice and Emerging Trends*. Dundee: Dundee University Press, pp. 443-497, at p.456.

⁸⁶⁷ The 'posterior' contract, *Ibid.*

those losses to Whiteacre and Blackacre, while the sub-subcontractor also assumes those of any subcontractors he may have. The latter contract between the subcontractor and the sub-subcontractor would achieve the same effect of moderating the indemnity that the subcontractor gave to Whiteacre, thereby restricting the subcontractor's liability to losses incurred by his own employees, as explained above. This is provided the fact that the subcontractor has secured an effective indemnity and hold harmless agreement from Whiteacre in respect of Whiteacre's and Blackacre's employees. In this way, every party that is within this indemnity structure ends up being responsible only for their own personnel, which is the overarching aim of the mutual hold harmless concept.

Currently, the IMMh is only subscribed by contractors as this is the target audience. Since the contract between Blackacre and Whiteacre has the indemnity structure that recites Whiteacre's responsibility for all tiers of their subcontractors, Whiteacre has an incentive to bring all their subcontractors within the indemnity structure by reference to the mutual hold harmless scheme, otherwise they – Whiteacre – would be responsible for those subcontractors at all tiers. Blackacre have already protected themselves through the indemnity structure in the anterior contract.

Contractors subscribed to the IMMh on a company basis, and not as part of a group structure, as this ensured that their subscriptions were not impacted by changes in the organisation or group structure. The overarching benefit of the IMMh to contractors was evident where the specific contract that they may be working on did not extend indemnity cover to the other contractors down the service chain; if those contractors have signed on to the *industry mutual hold harmless*

scheme, they were protected to the very same extent as though the contract had provided the cover.⁸⁶⁸

However, not all drilling contracts utilise the IMMHI indemnity structure, with many resorting to the knock-for-knock indemnity structure in the first instance, and then requiring that the parties extract back-to-back indemnities from their subcontractors of all tiers. The knock-for-knock indemnity structure requires each contract party to bear the economic consequences of the occurrence of specified adverse events such as death of, or injury to, employees and contractors, as well as property loss or damage, regardless of fault, with each party also indemnifying the other party accordingly when these events impact their own property and/or personnel.⁸⁶⁹ The protection afforded by the indemnity structure typically transcends the primary contract parties, and extends to their employees, officers, directors, affiliates, contractors and subcontractors.

The back-to-back indemnity structure that the contract parties are required to extract from their subcontractors of all tiers is supposed to mirror the provisions in the primary contract between Blackacre and Whiteacre. In effect, the contracts entered into by Blackacre and Whiteacre with other contractors and subcontractors are supposed to have indemnity provisions identical to those contained in the primary contract. Where this is done, it has the same effect as the IMMHI, moderating the indemnity given by Blackacre and Whiteacre *inter se*, leaving each party, including the subcontractors and sub-subcontractors, to bear the economic consequences of the occurrence of the specified adverse events to their own personnel and property.

4.1.3 Exclusion/Exemption Clause

⁸⁶⁸ Hewitt, T. (2008) 'Who is to Blame? Allocating Liability in Upstream Project Contracts', *Journal of Energy & Natural Resources Law*, 26(2), pp. 177–206, at p. 184.

⁸⁶⁹ Saraceni, P. and Summers, N. (2016) 'Reviewing Knock for Knock Indemnities: Risk Allocation in Maritime and Offshore Oil and Gas Contracts', *Austl. & NZ Mar. LJ*, 30, p. 28.

From the discussions on the bedrock and the foregoing sections, it is clear that parties were liable for every infraction committed, as the fault-based risk allocation regime dictated this approach. The indemnity structure examined above was developed by parties as a scheme that restored them to the *status quo ante* in respect of specific adverse events, in some cases after the event, but before the loss had been incurred – *hold harmless* – and, in other cases, after the loss had been incurred. Thus, it recognised that liability was first ascribed to one party, but then allocated the responsibility for bearing the economic consequences of the occurrence of the adverse events to another party.

However, there were circumstances in which Whiteacre did not want to incur any liability if certain events occurred. It was apparent that the indemnity structure did not address this, as the structure functioned on the basis of imposed liability and re-allocation of risk. Another response had to be developed by the parties to cater for situations where liability was wholly disclaimed, and this is why exclusion/exemption clauses were introduced into contracts.

Exclusion/exemption clauses operate to exculpate a party from liability⁸⁷⁰ in respect of certain adverse events, and so have the effect of allocating risk from the party who seeks reliance on them, to another contract party. In commercial contracts, exemption clauses usually exclude *consequential losses*, as well as losses resulting from *wilful misconduct* and *gross negligence*.

The rationale for excluding recovery of damages for *consequential losses* can be traced to the rule in *Hadley v. Baxendale*.⁸⁷¹ In considering circumstances in which damages could be awarded for losses suffered by a claimant, the court made a distinction between direct and indirect (consequential) losses, stating that a party can recover damages if they could be considered as arising naturally from an alleged breach, or if they could reasonably be presumed

⁸⁷⁰ See *Farstad Supply AS v Enviroco Ltd and Asco UK Ltd* (2010) UKSC 18.

⁸⁷¹ Ex. 341, 156 Eng. Rep. 145 (1854); (1854) EWHC J70.

as being recoverable within the contemplation of the parties, at the time of contract. Where the losses suffered did not satisfy either of these two conditions, they were categorised as *indirect* or *consequential*, and were not recoverable by a claimant.⁸⁷²

Although there is unanimity of agreement that consequential losses fall within the second limb of the rule in *Hadley v Baxendale*, the actual determination of what is *indirect* or *consequential* loss has been more difficult to deal with. For instance, the expression ‘*loss of profit*’ has often been regarded by the courts as a *direct* rather than an *indirect* loss.⁸⁷³ The rationale of the courts for this determination lies in the fact that the expression on its own is not automatically regarded as being indicative of consequential loss, but its function in the contract would turn on its interpretation within the particular context in which it is expressed.⁸⁷⁴

Again, the use of terms such as ‘*other*’ and ‘*including*’ has been held to have a restrictive effect on the interpretation of an exclusion clause. In *University of Keele v Price Waterhouse*,⁸⁷⁵ the court was tasked with the construction of the following clause:

‘We accept liability to pay damages in respect of loss or damage suffered by you as a direct result of our providing the Services. All other liability is expressly excluded, in particular, consequential loss, failure to realise anticipated savings or benefits ...’.

The court held that this clause failed to exclude the loss of tax savings, which it found to be *direct* rather than *indirect*. The court construed the term ‘*other*’ and stated that it was suggestive of the precedence accorded the first part of the clause by the contract parties, over the latter part. Thus, the latter part only excluded loss and damage not covered by the first part, in effect, only indirect losses. The court held that the correct approach to construing a contract clause is to

⁸⁷² See, for instance, *Croudace Construction v Cawoods Concrete Products* (1978) 2 Lloyd’s Rep 55 CA.

⁸⁷³ See, for instance, *Deepak Fertilisers and Petrochemical Corp Ltd v Davy McKee (London) Ltd* (1999) 1 All ER (Comm) 69. See also *BHP v British Steel* (2000) 2 LLR 277 (CA).

⁸⁷⁴ See, for instance, *Pegler Limited v Wang (UK) Limited* (2000) BLR 218.

⁸⁷⁵ (2004) All ER (D) 264 (May).

consider it as a whole to determine whether separate limbs therein were capable of harmonisation.⁸⁷⁶

Australian courts view consequential losses from a standpoint of reasonableness, stating that it should be interpreted as what an *ordinary business person* (emphasis added) will term as reasonable and recoverable.⁸⁷⁷ The resort to ‘reasonableness’ as a standard for determining whether a loss can be termed as *consequential* is certainly novel, but there is no evidence that this has ever been accepted by English courts as part of the jurisprudence on this subject.

Generally, a contract party who negotiates an exclusion clause should be allowed to take the benefit of it,⁸⁷⁸ whether this is relative to another contract party or to a third party.⁸⁷⁹ This is the stance that the court took in *Transocean Drilling UK Ltd v Providence Resources plc*.⁸⁸⁰ In overruling the decision of the High Court,⁸⁸¹ the Court of Appeal insisted that the *consequential losses* clause had to be given its natural and ordinary meaning, just like other clauses in the contract. It further criticised the High Court’s narrow interpretation of the words in the exclusion clause, which sought to limit the ordinary meaning of words, and re-affirmed that the agreement of the parties will be upheld where the meaning of words is clear.⁸⁸² A commentator has stated that the English courts are adopting a pragmatic approach and actually reaching their decisions based on *foreseeability* of the damage that ensued, whether they admit this or not.⁸⁸³

⁸⁷⁶ *Ibid*, at para 24.

⁸⁷⁷ *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* (2008) VSCA 26.

⁸⁷⁸ Cane, P. (1991) *Tort Law and Economic Interests*. Clarendon Press, at p. 334.

⁸⁷⁹ In this context, the term ‘third party’ is used to represent both classes referred to in the Introduction to this chapter, and includes third parties claiming certain benefit(s) under the contract, and those who have been impacted negatively by the activities of contract parties under the contract.

⁸⁸⁰ (2016) EWCA Civ 372.

⁸⁸¹ *Transocean Drilling UK Ltd v Providence Resources plc* (2014) EWHC 4260 (Comm).

⁸⁸² *Transocean Drilling UK Ltd v Providence Resources plc* (2016) EWCA Civ 372, at paras 20–24. The court also found that resort to the *contra proferentem* rule of construction is done only when the words used in the exemption clause are ambiguous. Since the meaning of the words was clear in this instance, the court criticised the application of that rule of construction.

⁸⁸³ Polkinghorne, M. (2012) ‘Exclusion Clauses: Navigating the Minefield’, *Oil, Gas & Energy Law Journal (OGEL)*, 10(5), at p. 5.

From the Court of Appeal's ruling, this study finds that 'consequential loss' is ultimately what the parties say it is, even though in most cases, parties fail to define this term. This is especially so when the parties have equal bargaining power. Indeed, if the parties define the heads of losses which are intended to be excluded in a consequential loss clause, the courts will uphold this, provided that the meaning of the words is clear, and the intention of the parties is manifest in the circumstances. The freedom of the parties to determine this is further strengthened by the fact that, in addition to excluding whatever heads of losses they agree to, they can also specify the remedy applicable if any of the excluded losses occurs.

In *Scottish Power UK Plc v BP Exploration Operating Co Ltd and Others*,⁸⁸⁴ the court upheld the *sole remedy* clause that the parties agreed would apply upon the occurrence of certain heads of losses contained in the exclusion clause. Even though it found that the relevant loss was not excluded by the exclusion clause, it recognised the parties' right to prescribe a remedy and, so long as the sole remedy clause proposed covers the exigency 'excluded' in the exclusion clause, the sole remedy will be enforced.⁸⁸⁵

Excluding losses arising from *wilful misconduct* and *gross negligence* follows the same principles. The courts have demonstrated their willingness to uphold the intent to exclude liability arising from losses attributable to wilful misconduct and gross negligence once this is

⁸⁸⁴ (2015) EWHC 2658 (Comm). The court followed the principle in *Transocean Drilling UK Ltd v Providence Resources plc* (2014) EWHC 4260 (Comm) at first instance to the effect that an exclusion clause will usually exclude *secondary* and *remote* losses, which both go beyond the normal or basic measure of loss, and which are not ordinarily expected to arise. The court interpreted the exclusion clause narrowly and found that the exclusion clause did not, in fact, exclude the head of loss in contention ('spread costs'), and found for Scottish Power on that point. It is doubtful whether this reasoning and decision will be upheld on appeal following the decision in *Transocean Drilling UK Ltd v Providence Resources Plc* (2016) EWCA Civ 372, even though the case was ultimately decided in favour of Scottish Power UK Plc. See also *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* (2014) EWHC 87 (Comm).

⁸⁸⁵ But contrast with the decision in *ABRY Partners V, L.P. v F & W Acquisition LLC*, 891 A.2d 1032, 1034 (Del. Ch. 2006) in which the court in Delaware, USA, refused to enforce a sole remedy (also called 'exclusive remedy') clause on the ground that it enabled the defendant to profit from his own fraudulent misrepresentation.

clearly expressed.⁸⁸⁶ Although *gross* negligence has not been accepted as part of English law,⁸⁸⁷ the courts agree that, within the context of exclusion clauses, this term could mean ‘a serious disregard of, or indifference to, obvious risk’.⁸⁸⁸ It is typical in offshore drilling contracts for parties to exclude liability for losses arising from negligence but not from gross negligence. It then becomes a matter of facts and circumstances to convince the court that the errant behaviour is gross negligence, which is not excluded, and not mere negligence which is excluded.

It is important to highlight that exemption clauses can be subjected to the test of reasonableness. Thus, courts can enquire into the purpose of the exemption clauses vis-à-vis the purport of the contract and can find that the clauses are *unreasonable in themselves or irrelevant to the purpose of the contract*⁸⁸⁹ (emphasis added). Again, if the contents of the exemption clause are too onerous to be enforced, the courts could refuse to do so on the basis of unreasonableness.⁸⁹⁰ Although it has been suggested that the courts can also refuse to enforce an exemption clause on grounds of *fairness*,⁸⁹¹ there is no evidence that this has ever been done in English courts.

The discussion above reveals that the intention of the parties seems to be the overriding consideration in determining enforceability and efficacy of exclusion clauses. Thus, upon the demonstration of clarity of meaning and certainty of intention, the courts have upheld exclusions, even when a party seems to be benefitting from his own infraction.⁸⁹² Indeed, in this way, it is

⁸⁸⁶ *Gillespie Bros Ltd v Roy Bowles Transport Ltd* (1973) QB 400 at 419; *Alderslade v Hendon Laundry* (1945) KB 189 at 192.

⁸⁸⁷ See, for instance, *Springwell v JP Morgan* [2010] EWCA Civ 1221 at para 193.

⁸⁸⁸ *Camarata Property Inc v Credit Suisse Securities (Europe) Ltd* (2011) EWHC 479 (Comm) at 161.

⁸⁸⁹ *Watkins v Rymill* (1883) 10 Q.B.D. 178 at 189.

⁸⁹⁰ *Thompson v London, Midland & Scottish Ry* (1930) 1 K.B. 41 at 56.

⁸⁹¹ *Laceys Footwear (Wholesale) Ltd v Bowler International Ltd* (1997) 2 Lloyd’s Rep. 369, at 384–385.

⁸⁹² This position recognises that there are other tools in the hands of the court with which to nullify an exclusion clause. For instance, if the exclusion amounts to a fundamental breach of contract (*Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* (1967) 1 AC 361), or it purports to exclude liability for fraud (*HIH Casualty & General Ins v Chase Manhattan Bank* (2003) UKHL 6; 2 Lloyd’s Rep. 61).

no different from indemnities considered earlier; contract parties understand the power that *freedom of contract* bestows and have not shied away from using it.

However, subjecting the exemption clauses to the test of reasonableness ensures a balance between the conflicting interest of freedom and overarching policy considerations. Society does not expect that contract parties should be allowed, under the guise of freedom of contract, to escape liability even for serious infractions; there must be a mechanism which overrides freedom in this regard, acting as a failsafe contraption to bring the contract in line with societal norms and mores.

Given the penchant for abuse, and on grounds of policy, it was inevitable that the legislature would intervene to attempt to infuse a semblance of order in this area of the law. The nature, scope and intent of this intervention, done by the enactment of the Unfair Contract Terms Act 1977 (UCTA 1977), is discussed below.

4.1.4 Limitation of Liability

Parties can agree to limit their exposure in respect of the extent of the economic consequences that they are willing to take responsibility for in the event that a specified risk event occurs. Courts recognise this approach, and apply the *contra proferentem* rule less rigorously, as they generally prefer parties to limit their liability rather than exclude it entirely.⁸⁹³

In this vein, parties can limit their liability based on heads of loss, types of breach, amount of money, or by restricting the timing and procedure for the other party to make a claim.⁸⁹⁴ Liability

⁸⁹³ *Ailsa Craig Fishing Co v Malvern Fishing Co Ltd and Securicor (Scotland) Ltd* (1983) 1 W.L.R. 964; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 AC 803.

⁸⁹⁴ Polkinghorne, M. (2012), *supra*, at p. 2.

can also be limited based on *participating interest* in a given undertaking, typically found in joint operating agreements.⁸⁹⁵

In offshore drilling contracts, similar to most commercial contracts in the oil and gas sector, the contractors almost always request for a limit on their financial liability. Gordon rationalises this by saying that exemption clauses do not offer as much protection to the contractor because the costs which can be directly attributable to the loss occasioned by a risk event can be inexorably higher than the contractor can bear, and even then, might be open to challenge. A cap on financial liability thus represents a valuable means of ensuring that the contractor's exposure is not indeterminate.⁸⁹⁶ In some cases, liability capping is also driven by the apprehension that the potential losses may far outstrip the contract sum.⁸⁹⁷

Although the attitude of the court is more relaxed as far as construing limitation of liability clauses, it has been stated that the courts ought to require that this be expressed with the same level of clarity and intent as is expected of an exclusion clause, especially where the consequences of enforcing the limitation of liability clause is dire.⁸⁹⁸

This study finds that the treatment of limitation of liability clauses should be similar to the manner in which *sole remedy* clauses are construed and considered. The factors that should weigh on the mind of the court should include the balance of power between the parties, the clarity of the meaning intended by the relevant clause, and the rationale of the stated mechanism

⁸⁹⁵ Josephson, M. D. (2003) 'How Far Does the CAPL Travel – A Comparative Overview of the CAPL Model Form Operating Procedure and the AIPN Model Form International Operating Agreement', *Alta. L. Rev.*, 41, pp. 1–28, at p. 10.

⁸⁹⁶ Gordon, G. (2011), *supra*, at p. 497. See also, Clause 35, General Conditions of CONTRACT for Supply of Major items of Plant and Equipment, LOGIC, Edition 2 – December 2005, <http://www.logic-oil.com/sites/default/files/documents/Supply%20of%20Major%20Items%20of%20Plant%20and%20Equipment%20Edition%202.pdf>, accessed 24 September 2016.

⁸⁹⁷ *Ailsa Craig Fishing Co v Malvern Fishing Co Ltd and Securicor (Scotland) Ltd* (1983) 1 W.L.R. 964, at 970.

⁸⁹⁸ *BHP Petroleum Ltd v British Steel Plc* (2000) 2 Lloyd's Rep 277 at 285.

for arriving at the relevant limit. Thus, where, for instance, the parties have capped liability to the contract sum, this should suffice as rationale for the capping, which the court should uphold.

Where parties have equal bargaining strength, the party that accepts the limitation of liability is deemed to understand that he bears the residual risk of the remainder of the economic consequences of the occurrence of the relevant risk event. It is then up to that party to take appropriate steps to manage, mitigate and/or prevent the risk event from occurring, steps which may include taking out insurance to cover that eventuality.

4.1.5 Liquidated Damages

As discussed in the previous chapter, in the fault-based risk allocation regime, if parties failed to stipulate any amount in damages in the contract, the court determines what is payable as *damages*, guided by the principle of *restitutio in integrum*. Quite often, a contract party may find the mechanism adopted and/or quantum of damages awarded by the court unsatisfactory.

Contract parties can allocate risk by pre-determining the consequences of a breach of contract by prescribing both the mechanism to be adopted and/or quantum of damages to be paid in the event of a breach of contract. In this way, parties are able to quantify the economic consequences of the occurrence of the risk event upfront, and can take adequate measures to prevent the risk event from occurring or ensure their ability to bear the risk if the adverse event occurs. This approach is also adopted to avoid the tedium of proving the actual extent of damage⁸⁹⁹ which justifies a specified amount of money as damages.⁹⁰⁰ When risk is allocated in this manner, this is referred to as *liquidated damages*.⁹⁰¹ The courts have held that specified and quantifiable

⁸⁹⁹ Peel, E. (2011) *Treitel The Law of Contract*. 13th ed. London, UK: Sweet & Maxwell, at p. 1073.

⁹⁰⁰ McGregor, H. (2003) *McGregor on Damages*. 17th ed. UK: Sweet & Maxwell, at p. 424.

⁹⁰¹ Anson, W. R., Beatson, J., Burrows, A. S. and Cartwright, J. (2010), *supra*, at p. 785.

property stated as being transferable upon a breach of contract can also be termed as liquidated damages.⁹⁰²

The modern formulation for determining whether a specified amount equates to liquidated damages, is traced to the guidelines laid down in *Dunlop Pneumatic Tyre Co v New Garage and Motor Co*.⁹⁰³ Essentially, a clause will be termed as liquidated damages if it represents a genuine pre-estimate of the loss that will be incurred upon a breach of the contract,⁹⁰⁴ and is basically a ‘calculation’ of the components of the loss presumed to be suffered by the innocent party, which the latter party is entitled to as compensation in accordance with the contract.

A distinction is drawn between *liquidated damages* and *penalties*. While the former is accepted and enforceable, the latter, formulated as being a provision which is *extravagant* and *unconscionable* relative to the breach which it seeks to cure,⁹⁰⁵ is unenforceable and void. The latter is, thus, not considered as being a genuine recompense to the innocent party but is deemed as being *in terrorem* of the offending party.⁹⁰⁶ The rationale for the non-enforcement of penalties lies in the fact that they actually serve no useful purpose other than as punishment to the offending party, even though the innocent party can be justly and fairly recompensed otherwise.

Recently, the Supreme Court of the United Kingdom (UKSC) laid down new rules to be utilised for the discernment of penalty clauses. In a significant departure from the previous law contained in the *Dunlop* case, the Supreme Court, hearing together the cases of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis*,⁹⁰⁷ stated that the first consideration is to

⁹⁰² *Jobson v Johnson* (1989) 1 W.L.R. 1026, CA.

⁹⁰³ (1915) A.C. 79, at 86–88.

⁹⁰⁴ See also *Clydebank Engineering Co v Don Jose Ramos Yzquierdo y Castaneda* (1905) A.C. 6, at 19.

⁹⁰⁵ McGregor, H. (2003), *supra*, at p. 425.

⁹⁰⁶ Furmston, M. P., Cheshire, G. C. and Fifoot, C. H. S. (2012), *supra*, at p. 785.

⁹⁰⁷ (2015) UKSC 67.

determine whether the breached provision is a secondary obligation⁹⁰⁸ or a conditional primary obligation.⁹⁰⁹ Where the provision is a conditional primary obligation, it cannot be termed as a penalty, as it would be deemed to be in furtherance of the legitimate interest of the innocent party, who has the right to enforce it. However, if it is a secondary obligation, the next step is to enquire whether it imposes on the wrongful party, ‘*a detriment out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation*’ (emphasis added).⁹¹⁰ Where the court makes a finding of this nature of detriment, it is *ipso facto* a penalty which is unenforceable.

These new rules have profound implications on the law of liquidated damages and penalties. First, it represents a departure from the age-old doctrine of *genuine pre-estimate* discussed above. Provided the relevant provision serves a legitimate commercial interest, and is not *extravagant, exorbitant or unconscionable*⁹¹¹ (emphasis added), it will not be labelled as a penalty, and is therefore enforceable.

Secondly, the court confirmed the supremacy of the notion of *freedom of contract*, holding that the penalty rule merely interferes with the parties’ freedom, and recognising the potential for this interference to lead to uncertainty which should be avoided.⁹¹² This is especially where the parties have equal bargaining power and have had the benefit of legal advice.⁹¹³

⁹⁰⁸ *Ibid*, at para. 14. This arises where a contract requires performance of an act by one party, failing which, he must compensate the innocent party with a specified amount of money; this payment is capable of being labelled a penalty.

⁹⁰⁹ *Ibid*, at para. 14. Where there is no contractual obligation on a party to perform an act, however, there is a provision that a specified sum of money must be paid to the other party if the first party fails to perform. This requirement to pay is a conditional primary obligation and cannot be labelled a penalty.

⁹¹⁰ *Ibid*, at para. 32.

⁹¹¹ *Ibid*, at para. 152.

⁹¹² *Ibid*, at paras. 33 and 257. See also *Caudill v Keller Williams Realty, Inc*, 2016 WL 3680033 (7th Cir. July 6, 2016) in which the court’s decision re-affirmed the fact that the notion of parties’ freedom of contract in agreeing damages applicable upon breach of a contract is moderated by legislative and judicial intervention – for instance, the rule on penalties.

⁹¹³ *Ibid*, at para. 282.

Thirdly, it re-affirmed the fact that the penalty doctrine is only triggered by the breach of a contractual provision,⁹¹⁴ and not otherwise.

The position above differs from the views of the Australian court in *Paciocco v Australia and New Zealand Banking Group Ltd.*⁹¹⁵ Both courts agree that legitimate commercial interests can go beyond recovery of damages based on a pre-estimate of loss, and on the notion of the supremacy of *freedom of contract*. However, the Australian court ruled that penalty doctrine can be triggered, not only by the breach of contractual provisions, but also recognises that a party's legitimate interests may transcend the recovery of damages for breach of contract.⁹¹⁶ In widening the scope of operation of the doctrine, the Australian court stated that it is incorrect to assume that only '*stipulations which engage the penalty doctrine must be those which are contractual promises broken by the promisor*'⁹¹⁷ (emphasis added).

In determining whether the provision to protect a legitimate interest is not a penalty, the courts will consider whether it is extravagant, exorbitant or unconscionable.⁹¹⁸ The determination of this must depend on the relevant facts, and must necessarily enquire into the extent of damage suffered vis-à-vis the quantum of compensation provisioned.

Perhaps more important to the English jurisprudence is the retention of the principle of *unconscionability* in the test on penalties. This was first seen in the guidelines laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co v New Garage and Motor Co.*⁹¹⁹ Given its retention in an expanded test in the *Cavendish* case, this study posits that the determination of clauses as

⁹¹⁴ *Ibid*, at paras. 12 and 120; See also *Moss Empires Ltd v Olympia (Liverpool) Ltd* (1939) AC 544; *Export Credits Guarantee Department v Universal Oil Products Co* (1983) 1 W.L.R. 399 ('ECGD').

⁹¹⁵ (2016) HCA 28.

⁹¹⁶ McDougall, R. 'Revisiting the Penalties Doctrine: *Paciocco v ANZ*', *The Commercial Law Association of Australia*, Sydney, NSW, 1–29, at p. 25.

⁹¹⁷ *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, at para. 45. This case preceded the *Paciocco* case at first instance, and *Paciocco* only became the claimant on appeal.

⁹¹⁸ *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* (2015) UKSC 67, at para. 152.

⁹¹⁹ (1915) A.C. 79, at 86–88.

penalties will increasingly depend on what the courts deem as *unconscionable*, and the subjective nature of this enquiry will widen the scope of discretion of the courts in reaching this determination. Progressively, the courts will widen the scope of application of the rule on *unconscionability* and, before long, it will assume the status of a doctrine, such that contracts, in general, may be required to satisfy the *conscionability* test⁹²⁰ before they can be enforced.

This view is supported by the fact that the Australian jurisprudence already has this doctrine as part of their laws, and the UK may seek to adopt this someday. As French, CJ stated in the *Paciocco* case:

‘All of the common law jurisdictions are rich sources of comparative law whose traditions are worthy of the highest respect, particularly those of the United Kingdom as the first source.’⁹²¹

The day might come when the courts of the UK might reciprocate this respect from their Australian counterparts and entrench *conscionability* as a doctrine for evaluating enforceability of contracts.

4.1.6 Insurance

In the previous discussion on insurance,⁹²² this study examined the role of insurance as a risk management strategy, and surmised that the contractual obligation to take out insurance is usually pursuant to indemnity provisions which offer protection to parties. In the bedrock and foregoing sections, the fault-based risk allocation regime was shown to be the reason for the

⁹²⁰ The *conscionability* test enquires into whether contract terms are manifestly unjust, or unreasonably one-sided and unduly favourable to the party whose bargaining power is stronger to such an extent that they are contrary to good conscience. In jurisdictions where the doctrine applies, the courts would refuse to enforce a contract deemed to be unconscionable if they decide that no informed or reasonable person would ordinarily accept the relevant provisions. A finding of unconscionability depends on the circumstances existing at the time of contract, and would include factors like bargaining power, mental capacity, availability of options age, and superior knowledge.

⁹²¹ *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) HCA 28, at p. 6, para 10.

⁹²² Section 1.5.6.

introduction of indemnities, exclusion/exemption and limitation of liability clauses in commercial contracts. This section examines the mechanisms through which the contract parties actually utilise insurance as a tool for risk allocation in response to the need to provide cover for the obligations assumed under the indemnities, exclusion/exemption and limitation of liability clauses in their contracts.

Under the contract, insurance can be voluntarily undertaken by an entity, arise pursuant to a contractual obligation, or be mandated by legislation. Irrespective of the manner in which the insurance is requisitioned, it must cover the relevant risks under the contract. To achieve this objective, multiple insurance contracts⁹²³ may need to be entered, with various policy limits which are set, either by contract or by operation of law.

A duty of disclosure exists at two levels, as far as the insurance policy is concerned. First, the insured is expected to disclose all material facts to the insurer, otherwise, the insurance policy can be voided on grounds of *material failure to disclose* or *material misrepresentation*.⁹²⁴ Secondly, the indemnitee can request the indemnitor to furnish the insurance policy, which the former is entitled to scrutinise to determine whether the insurance is adequate in respect of the policy limits as well as the risks covered, confirm whether they have been endorsed as *additional insured* on the policy,⁹²⁵ verify that the applicable law is that which is contemplated by the contract between the indemnitor and indemnitee, and that the insurance premia have been paid. In the USA, a further check is required to ensure that the law of the state that is detailed as the

⁹²³ Insurance contracts may include: *Commercial General Liability; Employers Liability/Workmen's Compensation; General Third Party; Third Party and Passenger Liability, Protection and Indemnity and Hull and Machinery.*

⁹²⁴ *Higherdelta Ltd v Covea Insurance Plc* (2017) CSOH 84; (2017) G.W.D. 21-349.

⁹²⁵ Anderson, R. (2008) "Certificates of Insurance" and "Additional Insured" Coverage - Maximize Value and Avoid Pitfalls', *The John Liner Review*, 22(2), at pp. 87–91.

governing jurisdiction permits *additional insured* endorsements, as some states have enacted laws which prohibit this.⁹²⁶

Importantly, the indemnitee must satisfy themselves about the viability of the insurer and their ability to bear the economic consequences of the occurrence of the events underpinning the insured risks.

Aside from being endorsed as *additional insured* in the indemnitor's insurance policy, the indemnitee must ensure that the policy contains a mechanism for notification by the indemnitor to the indemnitee if any change is made thereto, and that insurance premia are paid. Possible changes include a reduction in the level of cover, amendment of the cover tenor, or cancellation of the policy.⁹²⁷ It is in the indemnitee's interest to validate the tenor of the insurance, to ensure that it covers the duration of the contract between the indemnitor and indemnitee. Furthermore, if there is a need to keep the policy valid beyond the end of their contract, perhaps because of anticipated or contingent liabilities, then the indemnitee needs to ensure that this is done.⁹²⁸

The fact that the indemnitor has taken out insurance to cover the relevant risks does not preclude the indemnitee from taking out their own insurance. If this happens, and the contract parties have insurance that covers the same risks, the contract should designate the indemnitor's insurance as 'primary and non-contributing'.⁹²⁹ This will clearly delineate the insurance policy that will be utilised if this is required.

⁹²⁶ See, for instance, *Walsh Constr Co v Mutual of Enumclaw*, 104 P.3d 1146 (Or. Jan. 27, 2005) in which the Oregon Supreme Court held that Oregon's Anti-Indemnification Statute nullifies any clause mandating the indemnitor to endorse the indemnitee as an Additional Insured in its CGL policy.

⁹²⁷ Thornsjo, D. O. and Hasan, N. B. (2007), *supra*, at p. 62.

⁹²⁸ *Ibid*, at p. 31.

⁹²⁹ *Ibid*, at p. 57.

Where the indemnitor owes the indemnitee a *duty to defend*, this must be expressly stated in the contract between the indemnitor and indemnitee, as the courts will not automatically assume its existence.⁹³⁰ The insurance policy must reflect this obligation, and can only be utilised if the action instituted against the indemnitee requests damages in respect of the liability contemplated by the *duty to defend*. As was confirmed in the foregoing sections, even though the indemnitor's insurers are obliged to pay the defence costs, in the UK, the indemnitee retains the right to appoint own counsel, and to carry on their own defence.⁹³¹ This is different in the USA, where contract parties typically agree that the insurance company retains the right to control and conduct the defence.⁹³²

4.2 Risk Allocation between Parties to a Drilling Contract

Having examined the mechanisms which contract parties have generally utilised to allocate risks *inter se* in response to the fault-based manner in which the courts allocated risk in the absence of contract, this section now examines how the contract parties have utilised these mechanisms in the drilling contract. The discourse below recognises that parties to the drilling contract may not always allocate risk in the manner stipulated, as risk allocation in specific contracts is influenced by factors such as the balance of power between the parties, prevailing market/economic conditions, risk appetite, determination of the party best able to bear the risk, and affiliation of parties to drilling associations. Although the model contracts serve as the context and case studies of the thesis, discussions in this section will focus on drilling contracts in general and not particularly on any of the model contracts.

⁹³⁰ *Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd* (2013) EWHC 349 (Comm); (2013) 2 All E.R. (Comm) 97.

⁹³¹ *Pine v DAS Legal Expenses Insurance Co Ltd* (2011) EWHC 658 (QB).

⁹³² Thornsjo, D. O. and Hasan, N. B. (2007), *supra*, at p. 24.

Incentive theory recommends optimal risk sharing between the operator and contractor, which ensures that a balance is achieved between considerations of risk sharing and incentives. A situation in which a disproportionate amount of risk is transferred to the contractor may result in unwarranted high-risk premium which escalates rates unnecessarily.⁹³³ However, optimality must itself be balanced with the need to adequately incentivise the contractor, and this can be achieved through different means including guaranteeing loans by the contractor for rig construction that provides financing access and lowers interest rates, strengthening the rig ownership model, perhaps by a joint venture with the operator, and adjusting risk sharing for specified heads of costs via the compensation mechanism in the drilling rig contract.⁹³⁴

Compensation mechanism has been recognised as a tool for risk allocation in the drilling contract, and this is especially so in tight rig market conditions.⁹³⁵ Indeed, when Coates declared that most of the provisions of contracts allocate risk, the compensation section fell within that category.⁹³⁶ The rates in the compensation section typically reflect the level of risk that the operator is willing to take in achieving the drilling objectives for the contract, and internalise different parameters which have been evaluated and weighted during the bidding process to arrive at them. For instance, a typical bid evaluation process would include such criteria as performance efficiency and previous achievements, HSE culture, experience and financial capability. The contractor and operator negotiate rates which take all the relevant factors into consideration, and both parties expect that the level of risks that are allocated *inter se* are such that enable the delivery of the project on time and on budget, especially from the contractor's perspective.

⁹³³ See, generally, Osmundsen, P. (2015) 'Optimal Strategies for Rig Procurement', *Journal of Petroleum Science and Engineering*, 126(Supplement C), pp. 11–15, at p.13.

⁹³⁴ *Ibid*, at pp. 13–14.

⁹³⁵ Osmundsen, P., Sørensen, T. and Toft, A. (2008) 'Drilling Contracts and Incentives', *Energy Policy*, 36(8), pp. 3138–3144, at p. 3141.

⁹³⁶ Coates, J. C. IV (2012) 'Allocating Risk through Contract: Evidence from M&A and Policy Implications', Available at SSRN 2133343.

The role of the compensation mechanism as a risk-allocation tool is more visible in certain types of drilling contracts. Thus, where drilling is undertaken based on a *turnkey* or *footage* contract models, the contractor takes on more risk than in *daywork* contracts, as previously discussed,⁹³⁷ and this is reflected in the rates and incentives applicable to the contract.⁹³⁸

The study takes the position that the allocation proffered below is typical of the oil and gas sector, and some of the rationales and underlying bases for the allocation are examined in the next section. Irrespective of the risk allocation formula adopted by the parties, it is imperative that the risk allocation intention and provisions are express, clear and unequivocal, otherwise they may not be enforceable, thereby altering the allocation outcomes anticipated by the parties and potentially increasing transaction costs.

4.2.1 Risks Typically Assumed by the Operator

In determining which risks to accept during contracts negotiations between the operator and contractor, both parties evaluate the risks sought to be allocated to see whether this is already accommodated within their cost profile or insurance portfolio. Where this is not the case, the parties then evaluate whether the risk can be covered by available insurance, and if this is available, and the other party is willing to pay for this, the first party would typically assume the allocated risk. As previously discussed,⁹³⁹ the negotiation process through which risk allocation is achieved can sometimes be adversarial and rancorous, as parties seek to negotiate more advantageous positions for themselves. With the increased complexities and risks in drilling contracts, parties have had to focus on mechanisms for allocating risks in a manner that achieves their individual contract objectives, while ensuring that specific risks are assumed by parties best

⁹³⁷ In the Introduction.

⁹³⁸ Osmundsen, P., Sørensen, T. and Toft, A. (2008) 'Drilling Contracts and Incentives', *supra*, at p. 3142.

⁹³⁹ In the Introduction.

suited to manage them, all relevant factors considered. Although some of these factors are outside their control – for instance, the balance of power between the parties, and prevailing market/economic conditions – they must still grapple with all applicable factors, with due regard to their respective risk appetite, optimality, and affiliation to drilling associations, to strike a bargain that is acceptable to both sides.

That notwithstanding, there are risks that are typically reserved for the operator, as underwriters usually exclude them from the cover which they are either willing to, or routinely provide to contractors.⁹⁴⁰ From the contractor's perspective, all or most of the risks in the drilling contract should be reserved for the operator. This is because the operator is traditionally able to obtain insurance for the risks, and stands to benefit from the ultimate production of the oil well, to the exclusion of the drilling company. In practice, though, the operator does not bear all the risks in the drilling contract, and the risks that they traditionally bear are discussed hereunder.

It must be noted, however, that variations to this responsibility exist, depending on whether the drilling operations are undertaken on a *daywork*, *footage*, or *turnkey* basis. These variations are discussed in Chapter 5.

4.2.1.1 Death of, or Personal Injury to, Operator's Personnel

As discussed in the preceding sections, the indemnity structure in the drilling contract mandates the operator to bear the economic consequences of any event that causes death of, or personal injury to, any of their personnel, notwithstanding how this event was caused. This responsibility subsists even when the event was caused by the negligence of the contractor, and the latter is absolved from liability even in circumstances in which, but for the indemnity structure, the

⁹⁴⁰ For instance, insurance for wild well risks. See Moomjian, C. A. (1999) 'Contractual Insurance and Risk Allocation in the Offshore Drilling Industry', *Drilling Contractor*, March/April at p. 14.

contractor would have borne the economic consequences of the occurrence of the adverse event resulting to death or personal injury.

Even though this risk is contractually borne by the operator, legislation has intervened to re-order the allocation mechanism by the contract parties. Thus, the anti-indemnity statutes in the USA and, arguably, the Unfair Contracts Terms Act 1977 (UCTA) in the UK, have restricted the ability of a party to a drilling contract to be indemnified for own negligence, or to escape liability therefrom. However, there are exceptions to this rule. For instance, the Texas anti-indemnity statute⁹⁴¹ allows indemnification for own negligence resulting in death or personal injury if there is a written agreement by the parties that the indemnitor will provide the insurance that covers this liability.⁹⁴²

In the UK, there is still no agreement as to whether the UCTA applies to commercial transactions such as the drilling contract, and until there is judicial clarification of this question, the current state of the jurisprudence in this regard is that the operator is bound by the indemnity structure of the drilling contract that allocates the responsibility of bearing the economic consequences of death and personal injury to members of *operator group* to the operator, irrespective of cause or fault.⁹⁴³

4.2.1.2 Loss of, or Damage to, Own Equipment

⁹⁴¹ TEX. CIV. PRAC. & REM. CODE §§127.001 – 127.007.

⁹⁴² *Ibid.*, at 127.005(a).

⁹⁴³ See, for instance, *Michael Duthie v Transocean North Sea Ltd and Others* (2015) CSOH 20, in which a service technician employed by a third-party drilling company, at the instance of the operator, to work on the rig, developed a heart condition – myocardial infarction – and suffered injury. Although the action for summary judgment failed, had it succeeded, the operator would have been responsible to bear the economic consequences of the injury, as the technician is deemed to be part of *operator group*, even though the contractor had negligently failed to ensure that the relevant medical equipment (the ECG machine) was functional.

This is a continuation of the obligations imposed by the mutual hold harmless indemnity structure of the drilling contract. The operator remains liable for any damage to its equipment, whether caused by its own personnel, or by the contractor personnel. This is notwithstanding the fact that the equipment are in the contractor's custody, and the latter is responsible for ensuring that the equipment are properly stored and re-delivered to the operator in good condition upon completion of the drilling programme. The contractor is also responsible for maintaining some of the operator's equipment in their custody, even though this is typically at the operator's cost. Although the contractor is required to visually inspect *operator group equipment* for patent defects, the indemnity granted the contractor functions as a release, making the operator fully liable for the economic consequences of any adverse events resulting from the use of defective equipment, especially when the operator has been notified of same.⁹⁴⁴

4.2.1.3 Loss of, or Damage to, Contractor's Equipment in Certain Circumstances

Although the mutual hold harmless indemnity structure generally allocates the risk of loss of, or damage to, *contractor group equipment* to the contractor, there are circumstances in which the operator bears this risk. First, the operator bears the risk of damage to, or loss of, the contractor's equipment if the damage arises from an unsound location which is due to the operator's failure to ensure location adequacy and readiness. This head of risk is especially applicable to the drilling unit, and relates to information about the seabed, subsurface or soil conditions possessed by the operator.

⁹⁴⁴ See, for instance, *Point West London Ltd v Mivan Ltd* (2012) EWHC 1223 (TCC); *Warren-Bradshaw Exploration Co v Tripplehorn* 220 F.2d 291 (5th Cir. 1955).

In this vein, the operator's responsibility and liability coincide, as the operator is both responsible to ensure that the offshore location is ready to receive the drilling unit, and bears the responsibility for the economic consequences of any failure to do so which results in damage to the drilling rig. The operator is required to commission a geotechnical survey of the conditions of the well location prior to the arrival of the drilling rig. The operator is further required to forward the results of the geotechnical survey to the contractor, and, notwithstanding the fact that the operator cannot validate the veracity or adequacy of the information, would remain liable for any damage arising from subsurface conditions such as pipelines, craters and power lines. The burden to bear the economic consequences for the contractor's equipment covers payments of the applicable day rate for the period during which the drilling rig is standing by for repairs arising from the damage occasioned by the unsound location, as well as the time taken, either to implement any remedial steps required to make the location fit for purpose, or to select a new location. The rationale for this imposition is because the well location is selected by the operator,⁹⁴⁵ and the contractor is not privy to the steps taken by the operator to prepare the well location and is only guided by the geotechnical survey provided by the operator in respect of the subsurface conditions that could damage the rig or lead to its total loss.

Secondly, the operator bears the responsibility for the economic consequences of any damage to, or loss of the contractor's down-hole or surface equipment if this event is caused by acidic substances such as brine or drilling fluids. This liability extends to damage or loss occasioned by exposure to a corrosive environment, including, but not limited to corrosion arising from emissions from the well. In the case of loss of, or damage to down-hole equipment, the rationale for holding the operator liable is because the operator is the ultimate beneficiary of the output from the well, and every piece of equipment that is lost or damaged down-hole is directly in

⁹⁴⁵ Anderson, O. L. (1989), *supra*, at p.452.

pursuit of that objective. The only exception is if the contractor is negligent in the handling of the impacted equipment, in which case the contractor bears the liability exclusively. This is one of the circumstances specifically excluded from the mutual hold harmless indemnity structure, and is still based on the fault-based risk allocation mechanism.

4.2.1.4 All Pollution Except Arising from Surface Activities and Contractor Equipment

The operator bears the responsibility for the economic consequences of all pollution emanating from well operations, cratering, blowout, fire, seepage, or any other unrestrained flow of water, oil, gas, or other substance, and would extend to the expenses incurred in control and/or remediation of the pollution. The exception to this responsibility relates to pollution which emanates from above surface, and from the contractor's equipment. In the case of the latter situations, the contractor bears the responsibility.⁹⁴⁶

Post-Macondo, the real issue concerning liability for pollution has not been whether the operator bears the responsibility for subsurface pollution, but whether the operator is able to seek contribution from the contractor if the resulting pollution occurred due partly to the gross negligence of the latter. This is because the indemnity structure would typically allocate the responsibility for bearing the economic consequences of the incidence of pollution on the operator, irrespective of negligence.⁹⁴⁷

As previously discussed,⁹⁴⁸ the concept of *gross negligence* is not known to UK jurisprudence,⁹⁴⁹ even though the courts have recently held that where the contract parties have this verbiage in

⁹⁴⁶ Foster, S. J., Gibbie, K. W., Mason, D. C. and Baron, S. L. 'Risks Assumed In Drilling Contracts: Global Comparison and Case Histories'. *SPE/IADC Drilling Conference*: Society of Petroleum Engineers, at p. 3.

⁹⁴⁷ See, for instance, Art. 14.11, IADC Daywork Drilling Contract; Art. 18.12, IADC Footage Drilling Contract. See also Anderson, O. L. (1989) 'The Anatomy of an Oil and Gas Drilling Contract, *supra*, at pp. 440–441.

⁹⁴⁸ Under the heading: 'Requirement to "indemnify, defend, release and hold harmless"'.

⁹⁴⁹ Per Lord Justice Aikens in *Springwell v JP Morgan* (2010) EWCA Civ 1221 at para 193.

their contract, it would imply that they intended same to have a meaning different from mere negligence, and within the context of exclusion clauses, this term could mean ‘serious disregard of, or indifference to, obvious risk’.⁹⁵⁰

Thus, UK courts are unlikely to allow contribution in this manner unless there is a clear intention by the contract parties, expressed unequivocally by the wording of the contract, and not qualified or excluded when the contract as a whole is construed.⁹⁵¹

4.2.1.5 Operator’s Consequential Losses

The indemnity structure allocates the responsibility for bearing the economic consequences of own consequential losses on the operator, irrespective of cause or fault. This will include bearing the burden for certain heads of liability such as loss of revenue, loss of, or delay in drilling, profit or anticipated profit (if any), spread costs, loss and/or deferral of production, loss of product, cost of, or loss of use. As straightforward as this sounds, a lot of issues have arisen from the *consequential losses* clause, as parties have often contended on both meaning and scope of this exclusion clause.

Within the context of offshore drilling contracts, the pronouncement in *Transocean Drilling UK Ltd v Providence Resources Plc*⁹⁵² is relevant. In overruling the decision of the High Court,⁹⁵³ the Court of Appeal insisted that the *consequential losses* clause had to be given its natural and ordinary meaning, just like other clauses in the contract.

Given the approach to interpretation adopted by the courts, which may sometimes be inconsistent with the intention of the parties, it is typical to see offshore drilling contracts define the meaning

⁹⁵⁰ *Camarata Property Inc v Credit Suisse Securities (Europe) Ltd* (2011) EWHC 479 (Comm) at 161.

⁹⁵¹ See, generally, *Investors Compensation Scheme Ltd v West Bromwich Building Society* (1998) 1 WLR 896.

⁹⁵² (2016) EWCA Civ 372.

⁹⁵³ *Transocean Drilling UK Ltd v Providence Resources plc* (2014) EWHC 4260 (Comm).

ascribed to *consequential losses*. In this vein, the contract parties succinctly state the heads of losses which constitute *consequential losses*, putting it beyond contention what their intention is, leaving a court little choice other than to give effect to same, if there is no ambiguity.

4.2.1.6 Wild Well Control Expenditure

Even though the responsibility to provide well control and fire prevention equipment, including blowout preventers (BOP), lies with the contractor, who is also responsible for the physical effort to control a well if and when this is required, yet, the operator typically retains the responsibility to bear the economic consequences of the actual occurrence of a wild well or fire event, even though variations to this responsibility exist, depending on whether the drilling operations are undertaken on a *daywork*, *footage* or *turnkey* basis. These variations are discussed in Chapter 5.

Just like *consequential losses*, contract parties often define wild well components, especially ‘*blowout*’, to prevent ambiguity and ensure that the courts will enforce the terms of the contract relating to this. Post-Macondo, this has become even more crucial, as more disputes are expected to arise from this definition.⁹⁵⁴ However, even where this term has been defined, the potential for disputes still exists. There is some agreement that a blowout is an uninhibited flow of gas, oil, debris or other drilling fluids into the atmosphere,⁹⁵⁵ however the details of when an actual blowout has occurred continues to be problematic. In *Phillip Rosamond Drilling Co v St. Paul Fire and Marine Insurance Co*,⁹⁵⁶ the insurance company declined coverage in circumstances where drilling fluid had egressed the well, and control was lost. Their argument was that a blowout properly so called had not occurred as the well was not completely wild. The court

⁹⁵⁴ See *Amoco (UK) Exploration Co v British American Offshore Ltd* (2001) All ER (D) 244 (Nov), in which BOPs were fully discussed.

⁹⁵⁵ *How Does Blowout Control Work?* (2017): Rigzone. Available at: http://www.rigzone.com/training/insight.asp?insight_id=300&c_id=1 accessed 27 October 2017.

⁹⁵⁶ 305 So. 2d 630 (La. Ct. App. 1974).

disagreed, holding that if the pressure or flow of liquid and/or gas from a well cannot be restrained by the addition of drilling fluid in a way that allows normal drilling operations to continue, then the well will be deemed as completely uncontrollable.⁹⁵⁷

Drilling contracts now address new regulatory requirements for BOP testing and certification. Provisions requiring the contractor to comply with the operator's safety and environmental management system (SEMS) standards are mandated by operators, together with more rigorous requirements for maintenance, testing and certification of BOP, as well as rig crew training.⁹⁵⁸ This is in the aftermath of the Macondo blowout catastrophe relative to which BP sought contribution from Cameron – the manufacturers of the BOP – based on the findings that BOP was overall defective and not fit for purpose.⁹⁵⁹ That notwithstanding, BP remained the primary obligor in respect of the expenditures from the blowout incident for which it agreed to pay \$21 billion to the US federal and state governments in settlement of the liability arising therefrom.⁹⁶⁰

4.2.1.7 Loss of, or Damage to Well, Reservoir or other Subsurface Formation

The operator bears the responsibility for the economic consequences of a loss of, or damage to the well, reservoir or other subsurface formation. This loss or damage may arise from blowouts, fire, or from the process of bringing a wild well under control. However, if the loss or damage occurred by the sole negligence or wilful misconduct of any member of *contractor group*, the contractor will be required to drill another hole to an equal depth as the first hole had been

⁹⁵⁷ *Ibid*, at p.633.

⁹⁵⁸ Group, D. H. S. (2011) 'Final Report on the Investigation of the Macondo Well Blowout', *Center for Catastrophic Risk Management, University of California at Berkeley*, at pp. 119–123.

⁹⁵⁹ Schleifstein, M. and Thompson, R. (2013) *BP Oil Spill Trial: Blowout Preventer on Macondo Well Had Dead Battery, Miswired Solenoid, Expert Testifies*: NOLA.com | The Times-Picayune Available at: http://www.nola.com/news/gulf-oil-spill/index.ssf/2013/03/bp_oil_spill_trial_blowout_pre.html; accessed 28 October 2017.

⁹⁶⁰ Gilblom, K. and Jordan, A. (2018) 'BP's \$60 Billion Gulf Spill Tab Rises as Lawsuits Wind Down', *Bloomberg Quint*; Bloomberg LP. Available at: <https://www.bloombergquint.com/business/2018/01/16/bp-takes-1-7-billion-charge-on-deepwater-horizon-claims-closure>; accessed 21 January 2018.

previously drilled. If the hole is damaged, the contractor will be required to repair the damaged hole, reinstating it to its original state. The contractor is obliged to take these steps if the rig is still on the well location, and the contract parties are expected to agree a special re-drill rate at the inception of the contract to cater for this exigency.

However, if the loss or damage of the hole occurred because of the malfunctioning of the casings or tubings that the operator provided, or any other operator group equipment, or due to the failure of the cementing job, the operator is obliged to bear the full responsibility for the economic consequences of the restorative work performed to salvage the hole, including the costs of moving the rig to a new location if a substitute well is to be drilled.

4.2.1.8 Third Party Death, Injury or Property Damage Due to Operator's Negligence

In this section, 'third party' refers to any person or entity who does not belong to the *operator group, operator group personnel, contractor group or contractor group personnel*; the class of people that Moomjian refers to as 'true third parties'⁹⁶¹ – people who are negatively impacted by the operations of contracting parties, which cause death, injury or other damage to them, their property or their relatives (in case of death), because they are close enough to the contract activity *locus* as to be impacted by it.⁹⁶²

The operator bears the economic consequences of any third-party death, personal injury, loss of, or damage to property arising from the operator's sole negligence. Where the operator has merely contributed to the resulting event, their liability is determined by the proportion of their contribution to subject event, and the courts will decide the quantum of damages to be imposed,

⁹⁶¹ Moomjian, C. A. (1999) 'Contractual Insurance and Risk Allocation in the Offshore Drilling Industry', *Drilling Contractor*, March/April at p. 14.

⁹⁶² This is based on the 'neighbour principle' formulated in *Donoghue v Stevenson* (1932) AC 562.

as previously discussed.⁹⁶³ The third party's claim will usually be founded in *negligence* – or *nuisance* – and he would have to prove that he was harmed by the breach of an existing duty of care owed by the operator, which was occasioned by the tortious event.

The Privy Council has recently pronounced on the principle of *causation* enabling a third party to succeed in a claim in this context. In *Petroleum Co of Trinidad and Tobago Ltd v Ryan and Another*,⁹⁶⁴ the court held that the '*but for*' test of causation was still the appropriate test to be applied in establishing the nexus between the tortious act and the resulting harm. Even if the courts were inclined to adopt a more relaxed approach to bridge any evidential gaps for policy reasons in deserving cases, it could only do so if a causative link had ordinarily been established.⁹⁶⁵

Even though as between the operator and the contractor, third-party claims are typically to be borne in proportion to their respective liabilities, where applicable, under the law of negligence or nuisance in respect of the subject event, most drilling contracts would situate all liability for third party claims arising from a blowout, fire, crater, or any circumstances in which the well was out of control on the operator.

The operator's liability to third parties in this context has been stated in economics terms to be based on the notion of *correctional justice* rather than on the *utility* that it maximises, focusing on the third party's quest to ventilate a grievance that he has suffered from a specific tortfeasor. In this regard, the third party seeks recompense as a matter of right, and not necessarily to reduce accident costs or ensuring that the cheapest cost-avoider is made responsible for bearing the economic consequences of the tortious act.⁹⁶⁶ Therefore, it is crucial that the operator maintain

⁹⁶³ Under the heading: 'Law Reform (Contributory Negligence) Act 1945'.

⁹⁶⁴ (2017) UKPC 30.

⁹⁶⁵ *Ibid*, at paras 47– 49.

⁹⁶⁶ Coleman, J. L. (1992) *Risks and Wrongs*. CUP Archive, at pp. 381–382.

adequate insurance which spreads the risk and ensures that the responsibility attached to the liability can be discharged,⁹⁶⁷ since decisions of liability are also not based on whether the third party is better placed to insure against the wrongful act, but on the fact that the operator breached their obligations for which they should be held accountable.⁹⁶⁸

This study posits that the economics perspective in the context of third party liability is bound up with the debate as to whether the aim of law in society is to achieve *substantive justice* or *distributive justice*.⁹⁶⁹ In passing third-party liability judgments, courts are not guided by the ability of the third party to insure against the risk that eventuated, neither do they embark on an enquiry as to who is best able to bear the risk. They are simply guided by the fact that a substantive duty which was owed the third party by the operator was breached, thereby occasioning harm which must be recompensed. Unless the contract parties have otherwise allocated risk in a different manner, the courts are likely to make a finding of liability based on default risk allocation method that bears the fault element.

Furthermore, in determining the quantum of damages to be imposed, they are guided by the principles of *restitutio in integrum* which seeks to restore the third party to the *status quo ante*. To proceed in any other manner, and enquire into the third party's ability to insure against the risk that eventuated as a basis for liability, or seek to impose liability on an entity other than the tortfeasor, based on the ability to avoid cost more efficiently, will be tantamount to denying substantive justice to the victim, and negating the time-hallowed principle of *ubi jus ibi remedium*.

⁹⁶⁷ *Ibid*, at p. 206.

⁹⁶⁸ *Ibid*, at p. 207.

⁹⁶⁹ See, generally, Lucy, W. N. R. (1989) 'Contract as a Mechanism of Distributive Justice Comment', *Oxford J. Legal Stud.*, 9, at pp. 132–148; Kronman, A. T. (1979) 'Contract Law and Distributive Justice', *Yale L.J.*, 89, pp. 472–512.

4.2.2 *Risks Typically Assumed by the Contractor*

The full scale of the risks borne by the contractor would usually be driven by factors such as the balance of power between the parties, prevailing market/economic conditions, available insurance and affiliation to drilling associations. In tight market conditions, the contractor can extract more favourable terms from the operator, and shift the responsibility for bearing the economic consequences of the occurrence of some events that would typically be the contractor's responsibility.⁹⁷⁰

From the contractor's perspective, most of the risks in the drilling contract should be borne by the operator because the latter gets the ultimate benefit of the drilling operations. However, there are some risks which the operator is unable to bear, for instance the risk of total loss of the drilling unit, as insurance is typically available to the contractor for those specific heads of losses. In those instances, the contractor is evidently the party that is best able to bear the risk, and is allocated the same accordingly.

Given the mutuality of the indemnity structure, responsibility for some risk events overlap between the operator and contractor. These events have been detailed below, and from the perspective of the contractor in appropriate cases. Other risk events that are solely the responsibility of the contractor are also discussed below.

4.2.2.1 *Death of, or Personal Injury to, Contractor's Personnel*

The contractor is under a similar obligation - as the operator with respect to *operator group* - to bear the economic consequences of the death of, or personal injury to, any member of *contractor*

⁹⁷⁰ See, generally, Osmundsen, P. (2015) 'Optimal Strategies for Rig Procurement', *Journal of Petroleum Science and Engineering*, 126 (Supplement C), at pp. 11–15.

group or *contractor group personnel*.⁹⁷¹ As previously discussed,⁹⁷² this liability is predicated on the indemnity structure in the drilling contract, which assumes that the mutual hold harmless provisions are contained therein. This obligation subsists even when the operator has made payments to settle the claim brought by a member of *contractor group* or *contractor group personnel*. The contractor is still obliged to reimburse the operator for any payments made, even when the operator's insurance company has settled the claims.⁹⁷³

One way in which the operator tries to guard against death or injury to *contractor group personnel* is by requiring that the contractor present only competent, trained and qualified personnel to work at the well location. However, this raises the issue as to whether the contractor is adequately incentivised to do this, especially if the contractor has multiple drilling campaigns for different operators. In other words, is a contractor more likely to provide its best personnel, who are probably better able to work devoid of negligence that leads to death and injury, if the operator offers adequate incentives? The incentive theory suggests that this is possible, especially if the incentive offered is the promise of future business.⁹⁷⁴

However, there are also disincentives that can arise from an approach that equates personnel competence with safety outcomes. Such an approach is in the danger of assuming that once personnel are competent, then safety is assured, but this thinking has been disputed by other writers who state that safety and quality measures transcend competent personnel, as they permeate all aspects of the drilling operations, and should be managed holistically.⁹⁷⁵ They opine that safety outcomes cannot optimally be achieved by incentive agreements, and advocate for a

⁹⁷¹ See, for instance, *Brand v Transocean North Sea Ltd* (2011) CSOH 57.

⁹⁷² Under the heading 'Death of, or Personal Injury to, Operator's Personnel'.

⁹⁷³ *Caledonia North Sea Ltd v London Bridge Engineering Ltd* (2002) UKHL 4; (2002) 1 Lloyd's Rep 553.

⁹⁷⁴ Osmundsen, P., Sorenes, T. and Toft, A. (2009) 'Oil Service Contracts: New Incentive Schemes to Promote Drilling Efficiency', *USAAE-IAEE WP 09-028*, at pp. 1–23, Available: International Association for Energy Economics. Available at: <https://ssrn.com/abstract=1517194>.

⁹⁷⁵ Osmundsen, P., Toft, A. and Dragvik, K. A. (2006) 'Design of Drilling Contracts—Economic Incentives and Safety Issues', *Energy Policy*, 34(15), at pp. 2324–2329.

reduction of such personnel-focused incentives, and an increased focus on adequate safety control measures.⁹⁷⁶

The above notwithstanding, for any incentive design to be effective, it must satisfy the *controllability* principle. If the incentives are to engender the desired benefits, they must be aligned with quantities and conditions within the contractor's sphere of influence.⁹⁷⁷ Thus, being able to select the personnel, as well as the ability to replace them, though subject to the operator's approval, ensures that the contractor is incentivised, not only to present their best personnel, but also guarantees that personnel will work in compliance with the standards and requirements that avoid death and injury to them.

4.2.2.2 Loss of, or Damage to, Own Equipment including the Drilling Rig

The contractor bears the responsibility for the economic consequences of any loss of, or damage to their equipment when they are above the rotary table, irrespective of whether drilling operations are being undertaken on a *turnkey*, *footage* or *daywork* basis. This responsibility extends to equipment such as drilling tools and appliances which are used above the rotary table, and the contractor retains responsibility for such loss or damage notwithstanding the negligence of the operator.

However, there are important exceptions to this position. When the damage to the contractor's surface equipment has resulted from obstructions above the rotary table that should have been removed by the operator, the latter will be responsible.⁹⁷⁸ The operator would get a reprieve from

⁹⁷⁶ *Ibid*, at p. 2325.

⁹⁷⁷ Osmundsen, P., Sorenes, T. and Toft, A. (2009) 'Oil Service Contracts: New Incentive Schemes to Promote Drilling Efficiency', *supra*, at p.12.

⁹⁷⁸ Anderson, O. L. (1989) 'The Anatomy of an Oil and Gas Drilling Contract', *supra*, at p. 451.

this liability if the contractor's insurance covers the head of loss experienced, and they – the contractor – would only be expected to cover any shortfall in the insurance.⁹⁷⁹

Again, the operator will be responsible for any loss of, or damage to, the contractor's surface equipment which results from emissions from the well, this is regarded as being on the same pedestal as damage from a wild well situation, which encompasses blowouts and other discharges from the well,⁹⁸⁰ as previously discussed.⁹⁸¹

Although the operator ordinarily assumes the responsibility for the economic consequences of any loss of, or damage to, the contractor's in-hole equipment, this is when the drilling operations are conducted on a *daywork* basis. Where drilling is undertaken on a *turnkey* or *footage* basis, the contractor is effectively in charge of the operations, and in full control of the well. Thus, the contractor would be responsible for any loss of, or damage to, any of their own in-hole equipment arising from down-hole operations. However, the responsibility for the in-hole equipment will shift to the operator if difficult or hazardous formations are encountered during drilling, or if abnormal pressure is experienced in the hole.⁹⁸²

The foregoing shows the intricacies of dealing with a loss of, or damage to the contractor's equipment vis-à-vis the operator's equipment. This is even more pronounced when it is the drilling unit itself that is damaged or destroyed. A practical problem is presented when the drilling unit is damaged by a supply vessel hired by the operator.⁹⁸³ If the supply vessel contractor has signed up to the *industry mutual hold harmless* (IMHH) scheme previously discussed,⁹⁸⁴ they

⁹⁷⁹ *Ibid*, at p. 451.

⁹⁸⁰ *Ibid*, at p. 452.

⁹⁸¹ Under the heading 'Wild Well Control Expenditure'.

⁹⁸² *Op.Cit*, at p. 454.

⁹⁸³ See, for instance, *R. v McNair (Donald Niven)* (1989) 11 Cr. App. R. (S.) 465; MarEx (2011) 'Supply Ship Collides with Transocean Drill Rig off Newfoundland'; The Maritime Executive. Available at: https://www.maritime-executive.com/article/supply-ship-collides-with-transocean-drill-rig-off-newfoundland#gs.zK=_vBg accessed 22 January 2018.

⁹⁸⁴ Under the heading 'Industry Mutual Hold Harmless'.

were protected to the very same extent as though the contract had provided the cover.⁹⁸⁵ However, if the IMM scheme is not in place, then recourse would be had to the drilling contract which should typically contain *knock-for-knock* provisions, and if the operator's contractors and subcontractors are listed as part of *operator group*, then the supply vessel contractor may escape liability, leaving the drilling contractor to bear the economic consequences of the damage caused to the drilling unit.

If, on the other hand, the operator's contractors are not protected by the drilling contract's indemnity structure, then the supply vessel contractor is a third party for all intents and purposes, and the drilling contractor is entitled to be indemnified by the operator for the ensuing damage.⁹⁸⁶ The drilling contractor can also proceed directly against the supply vessel contractor in negligence, as there has been a breach of the latter's duty of care to the former which has resulted in damage.⁹⁸⁷

In general, however, the contractor is responsible for any loss of, or damage to, the drilling unit, and is also responsible for raising and removing it, if it becomes stranded, or a wreck, or otherwise capsizes, sinks or constitutes an obstruction to navigation.⁹⁸⁸ In these instances, it is usually a matter between the contractor and their insurers.⁹⁸⁹ For instance, in the aftermath of the Macondo catastrophe on 20 April 2010, the drilling unit – *Deepwater Horizon* – sank on 22 April 2010. On 5 May 2010, the owner of the rig, Transocean, received a partial insurance settlement in the sum of US \$401 million for its total loss.⁹⁹⁰

⁹⁸⁵ Hewitt, T. (2008) 'Who is to Blame? Allocating Liability in Upstream Project Contracts', *Journal of Energy & Natural Resources Law*, 26(2), pp. 177-206, at p. 184.

⁹⁸⁶ See, generally, *Farstad Supply AS v Enviroco Ltd and Asco UK Ltd* (2010) UKSC 18 on third-party liabilities.

⁹⁸⁷ See, for instance, *Krysia Maritime Inc v Intership Ltd (The Krysia)* (2008) EWHC 1523 (Admlty).

⁹⁸⁸ See *Seadrill Management Services Ltd v OAO Gazprom* (2011) 1 All E.R. (Comm) 1077.

⁹⁸⁹ See, for instance, *Syarikat Takaful Malaysia Bhd v Global Process Systems Inc* (2010) 3 All E.R. 248; (2010) 2 All E.R. (Comm) 224.

⁹⁹⁰ Green, M. (2010) *Transocean: Insurers Have Already Paid \$401 Million for Deepwater Horizon Loss*. USA: InsuranceNewsNet. Available at: <https://insurancenewsnet.com/oarticle/Transocean-Insurers-Have-Already-Paid-401-Million-for-Deepwater-Horizon-Loss-a-188498#.Wfp6CGaDPIU>; accessed 2 November 2017.

4.2.2.3 All Pollution Arising from Surface Activities and Contractor Equipment

When pollution arises in the ordinary course of drilling operations, above the rotary table, the contractor bears the responsibility for the economic consequences of the occurrence thereof. This is especially if the pollution emanated from substances and equipment that were within the use and control of the contractor, and this liability would attach notwithstanding the negligence of the operator. This position is relatively straightforward and is seldom contested by the contract parties.

The more contentious issue relates to the contractor's liability for pollution emanating from a blowout for which the contractor has been alleged to have been contributorily negligent. The contractor's liability for pollution following the occurrence of a blowout was an issue in the aftermath of the Macondo catastrophe. BP alleged gross negligence on Transocean's part as a basis for liability for pollution emanating from below the rotary table, but this claim was rejected by the court, which found that Transocean had only been negligent but not grossly negligent⁹⁹¹. The court found that BP's reckless and egregious behaviour had caused the spill, and that Transocean's negligence lay in the fact that it had not adequately trained its personnel to use the diverters that would have diverted the erupting hydrocarbons away from the drilling unit.⁹⁹² If this allegation had been upheld by the court, Transocean would have been required to share the responsibility of bearing the economic consequences of the blowout with BP.

⁹⁹¹ The Transocean/BP litigation, Case 2:10-md-02179-CJB-SS Document 5446, *supra*, at p. 5. See also Almeida, R. (2014) *Transocean Cleared from Deepwater Horizon Blowout Liability*. USA: gCaptain. Available at: <http://gcaptain.com/transocean-cleared-deepwater-horizon-blowout-liability/>; accessed 2 November 2017.

⁹⁹² See also Mufson, S. (2014) 'BP's 'gross negligence' Caused Gulf oil spill, Federal Judge Rules', *The Washington Post*, 4 September 2014. Available at: https://www.washingtonpost.com/business/economy/bps-gross-negligence-caused-gulf-oil-spill-federal-judge-rules/2014/09/04/3e2b9452-3445-11e4-9e92-0899b306bbea_story.html?utm_term=.a1c43ac6a7f2 accessed: 22 January 2018.

As previously discussed,⁹⁹³ the concept of *gross negligence* is unknown to English law,⁹⁹⁴ although the courts recently held that where the contract parties have this provision in their contract, it would be interpreted as the intention to ascribe to it a meaning different from mere negligence and, within the context of exclusion clauses, this term could mean *a serious disregard of, or indifference to, obvious risk*.⁹⁹⁵

Thus, English courts are unlikely to allow contribution in this context unless there is a clear intention by the contract parties, expressed unequivocally by the wording of the contract, and not qualified or excluded when the contract as a whole is construed.⁹⁹⁶

The potential for contributory negligence on the part of the contractor for pollution emanating from blowouts, is real, in circumstances where the drilling contract makes this provision, and simultaneously tasks the contractor with responsibility of providing and maintaining the equipment essential for ensuring safety and for controlling and preventing blowouts, and imposes the obligation to use every reasonable means to undertake this task.

Although this responsibility looks onerous for the contractor, new regulations that emerged in the USA, in the aftermath of the Macondo disaster, have provided guidance on specific operational requirements which directly impact well control, as well as the full complement of equipment to be maintained.⁹⁹⁷ It is this study's position that a contractor who can demonstrate full compliance with the regulations, as well as the fact that they acted in a '*a good, diligent, safe*

⁹⁹³ Under the heading: 'Requirement to "Indemnify, Defend, Release and Hold Harmless"'.

⁹⁹⁴ Per Lord Justice Aikens in *Springwell v JP Morgan* (2010) EWCA Civ 1221 at para 193.

⁹⁹⁵ *Camarata Property Inc v Credit Suisse Securities (Europe) Ltd* (2011) EWHC 479 (Comm) at 161.

⁹⁹⁶ See, generally, *Investors Compensation Scheme Ltd v West Bromwich Building Society* (1998) 1 WLR 896.

⁹⁹⁷ The operational requirements include rig audits, acoustically controlled subsea BOP systems, kick detection and response procedures, shear ram design, pressure testing, redundant BOPs, and also prescribed minimum standards for well control training. See the Report to the President by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling that was released on 14 September 2011. The report can be accessed at: <https://cybercemetery.unt.edu/archive/oilspill/20121210172821/http://www.oilspillcommission.gov/>

and workmanlike manner’ will stand a good chance of defeating a claim of gross negligence in these circumstances.⁹⁹⁸

4.2.2.4 Contractor’s Consequential Losses

The contractor bears the responsibility for the economic consequences of any *consequential losses* incurred while performing the drilling contract. Likewise, the contractor is contractually protected from assuming the responsibility of the economic consequences of any *consequential losses* incurred by the operator arising from the contractor’s activities under the drilling contract.

From the contractor’s perspective, the most crucial obligation owed to them by the operator is the obligation to pay the applicable rate agreed by both parties. The operator is also contractually liable to pay liquidated damages in certain specified circumstances, or upon the occurrence of certain specified events – for instance, early termination of the contract. In this regard, it is in the contractor’s interest to ensure that the definition of *consequential losses* captures these obligations and circumstances, specifically excluding them from the other classes of prohibited events, thereby ensuring that the operator pays accordingly.

Although the drilling contract generally excludes recovery of consequential losses, the courts have held them to be recoverable in deserving circumstances, such as where the action causing the breach by the contractor was specifically prohibited by the contract, and the loss occasioned thereby is significant.⁹⁹⁹ There is no denying the fact that if the drilling contract is silent on the exclusion of liability for consequential losses, the contractor stands to lose more, given the fact

⁹⁹⁸ Metcalf, S. K. (2010) ‘Contract: What Is “Performance in A Good and Workmanlike Manner”?’ , *MMMC*, McDonald, McCann, Metcalf & Carwile, LLP. Available at: <http://mmmsk.com/contract-what-is-performance-in-a-good-and-workmanlike-manner/> accessed 13 October 2017.

⁹⁹⁹ See, for instance, *Transocean Drilling UK Ltd v Providence Resources Plc* (2016) EWCA Civ 37; *Croudace Construction Ltd v Cawoods Concrete Products Ltd* (1978) 2 Lloyd’s Rep. 356; *Riddle v Lanier*, 136 Tex. 130, 145 S.W.2d 1094 (Tex. Comm’n App. 1941).

that the contractor is more exposed to the operator as the former are usually in control of the actual drilling operations.¹⁰⁰⁰

4.2.2.5 Third-Party Death, Injury or Property Damage Due to Contractor's Negligence

Just like the operator, the contractor is responsible for the economic consequences of any harm inflicted upon a third party arising from their – the contractor's – activities under the drilling contract. As previously stated,¹⁰⁰¹ this responsibility will not extend to third-party harm arising from well control issues like blowouts and craters, irrespective of whether the contractor was responsible for the well at the time of the incident.

In the same vein, the contractor typically assumes the responsibility for the economic consequences of any third-party harm occasioned by rescue or salvage operations conducted from or to the drilling unit. Third-party harm in this context would typically arise from pollution, navigation accidents caused by the wreckage of the drilling unit itself, or the wreckage removal equipment mobilised at the instance of the contractor. The cost of these operations can be quite significant,¹⁰⁰² and so drilling contractors typically belong to P&I (Protection & Indemnity) clubs that would assume financial responsibility for third-party liabilities of members.¹⁰⁰³ A P&I club functions as an insurance company, law firm and loss adjuster for the benefit of its members.¹⁰⁰⁴

¹⁰⁰⁰ Anderson, O. L. (1989) 'The Anatomy of an Oil and Gas Drilling Contract', *supra*, at p. 405.

¹⁰⁰¹ Under the topic: 'Third Party Death, Injury or Property Damage Due to Operator's Negligence'.

¹⁰⁰² For instance, the salvage operation of the *Costa Concordia* off the coast of Italy cost circa US\$1.3 billion (<http://www.marine-salvage.com/overview/wreck-removal/>).

¹⁰⁰³ Seward, R. C. (2002) *The Role of Protection and Indemnity (P&I) Clubs*: Tindall Riley (Britannia) Ltd. Available at: <http://www.intertanko.com/upload/presentations/protection%20%20indemnity%20HK%202002.pdf>; accessed 27 November 2017.

¹⁰⁰⁴ *Ibid*, at p.2.

Even though the contractor has the benefit of insurance, they would usually seek to ensure that their liability for third party harm aligns with the limits detailed in their insurance contract:¹⁰⁰⁵ they would seek to allocate the risk of anything above this limit to the operator. To accept this residual risk, the operator would typically require the contractor to be completely transparent about its insurance terms and scope, which would then be evaluated for adequacy and reasonableness when such factors as the size, structure and resources of the contractor are considered.¹⁰⁰⁶

It is important to reiterate that the foregoing discussion on third parties focuses on the class of people who are negatively impacted by the operations of contracting parties, which cause death, injury or other damage to them, their property or their relatives (in case of death). Protection of these third-party interests is founded on the law of tort and is justified by the duty of care that is owed to persons who are close enough to the contract activity *locus* as to be impacted by it.¹⁰⁰⁷ This assumes that the other class of third parties whose services have been retained by either contracting party are part of the indemnity structure, and so any injury to them, or their property, would be covered by the knock-for-knock indemnity principle.

4.2.2.6 Intellectual Property and Patent Infringements

From the contractor's perspective, the risk of intellectual property infringement is very real, as they undertake actual drilling operations, and advise on the additional services to be mobilised in furtherance of the drilling campaign. Intellectual property infringement is on the same pedestal as inflicting third party harm, as the infraction would almost always be in respect of improper dealing in a manner inconsistent with the ownership of an entity that is not party to the

¹⁰⁰⁵ Franklin, H. (2005) 'Irretrievable Breakdown? A Review of Operator/Contractor Relationships in the Offshore Oil and Gas Industry', *Journal of Energy & Natural Resources Law*, 23(1), pp. 1–14, at p. 10.

¹⁰⁰⁶ *Ibid*, at p.11.

¹⁰⁰⁷ This is based on the 'neighbour principle' formulated in *Donoghue v Stevenson* (1932) AC 562.

drilling contract. Where the infraction is against the proprietary interest of another contract party, the indemnity structure will be triggered to allocate risks between the contract parties *inter se* accordingly.

Depending on the scope, scale, public policy considerations and manner of infringement, intellectual property infractions could give rise either to civil and/or criminal liability.¹⁰⁰⁸ The most common type of intellectual property typically infringed within the drilling context falls under the law of *patents*,¹⁰⁰⁹ and only gives rise to tortious liability.¹⁰¹⁰ Where established, this tortious liability can be very costly, and the process for determining the damages payable can also be very rigorous.¹⁰¹¹

The foregoing creates the incentive for the contractor to limit their exposure to the potential liability to third parties. Even though the contractor, and the operator, should ordinarily bear the responsibility for the economic consequences of their intellectual property infringements, the contractor would typically seek to cap their liability to the limits of their insurance. While the operator would seek to exclude intellectual property from the *aggregate liability*,¹⁰¹² so that any occurrence would be recompensed fully by the contractor, the latter would seek to subsume intellectual property infringement within the *aggregate liability*, potentially leaving the operator

¹⁰⁰⁸ Bently, L. and Sherman, B. (2014) *Intellectual Property Law*, 4th ed. Oxford University Press, USA, at pp. 1238–1263.

¹⁰⁰⁹ See, for instance, *Halliburton Energy Services Inc v Smith International (North Sea) Inc* (2005) EWHC 1623 (Pat), in which the contention was in respect of infringement of patents related to the design of roller cone drill bits used in vertical drilling for oil and gas wells.; see also *Transocean Offshore Deepwater Drilling, Inc v Maersk Drilling USA, Inc*, No. 11-1555 (Fed. Cir. Nov. 15, 2012), in which the Federal Circuit reversed the District Court's decision, and held that the disputed patents were valid, and had been infringed by the Respondents, Maersk Drilling USA, Inc, thereby entitling Transocean Offshore Deepwater Drilling, Inc to damages.

¹⁰¹⁰ Miller, R., Burkill, G., Birss, C. and Campbell, D. (2011) *Terrell on the Law of Patents*. Sweet & Maxwell, at p.427, para 14.01.

¹⁰¹¹ See, generally, Keeley, M. C. (1999) *Estimating Damages in Patent Infringement Cases: An Economic Perspective*. New York: Cornerstone Research, Inc. Available at: <https://www.cornerstone.com/Publications/Research/Estimating-Damages-in-Patent-Infringement-Cases>; accessed: 28 November 2017.

¹⁰¹² The highest amount of cover that the insurer is obliged to provide to the insured in a liability insurance policy. It may stipulate a given amount per occurrence, as well as the total payable for all occurrences during the term of the policy.

with a higher possibility of bearing the responsibility for the economic consequences of the residual risk.¹⁰¹³ This situation is typically resolved by negotiation and compromise by the contract parties, but market conditions and the balance of power between them also play a role in this regard.

4.3 Rationale for the Manner of Risk Allocation between Parties to a Drilling Contract

The preceding sections focused on the allocation of responsibilities and risks by the parties to the drilling contract *inter se*, highlighting the different perspectives of operator, non-operator and contractor. That section essentially built on the previous chapter of the study in which the default risk allocation methods – the bedrock – were examined, together with the contractual response by contract parties which modified the default positions. Focusing on the allocation of responsibilities and risks by the parties to the drilling contract *inter se* deepens understanding, not only of the distinction between the default risk allocation method and the modification by the parties, but also of the dynamics of the distribution of those responsibilities and risks, further consolidating the departure from the default risk allocation methods.

Having examined *what* the risks are, and *how* they are allocated by the parties, this section examines *why* they have been allocated in the manner that they have, and *whether* they could have been allocated in a different manner. Essentially, this is an analysis of whether the way the parties have allocated risks is effective in achieving their contract objectives, especially when juxtaposed with the bedrock positions relating to the different risk events.

4.3.1 Risk Allocation Rationales based on Industry Practice

¹⁰¹³ See, generally, Franklin, H. (2005) 'Irretrievable Breakdown? A Review of Operator/Contractor Relationships in the Offshore Oil and Gas Industry', *supra.*, at p. 13.

Some rationales for risk allocation have arisen from long and sustained practice within the oil and gas industry. Although this practice has not emanated from any written convention or agreement, the global nature of its adoption and/or application lends credence to its existence and relevance. Like any other practice that is not backed by force of law, it remains of persuasive character, and contract parties are at liberty to ignore it and allocate risks *inter se* as they deem fit.

Furthermore, even when contract parties seem to have ‘adopted’ the practice, there is no evidence of any documentation which attributes the manner of risk allocation to any practice. Given the private nature of contracts and contracts negotiations, unless parties actually reflect the underlying philosophies of the contract terms in the drilling contract, rationale in specific contexts can only be a matter of conjecture. Reference is only made to the ‘adoption’ of the practice in retrospect, and to its global existence, when multiple instances of that adoption can be established across different jurisdictions.

4.3.1.1 Doctrine of Tradition

The doctrine of *tradition* operates on the premise that risk for designated personnel, equipment and procedure is usually assigned to the contractor, leaving the other obligations/risks to be allocated between the parties by negotiation, in the absence of which any unallocated risk will default to the operator.¹⁰¹⁴ In this vein, the doctrine of *tradition* is complemented by the concept of *custom* by which terms arising from the usage or practice of a given trade or market, or from prior dealing between the relevant parties, may be implied into their contract.¹⁰¹⁵ Although there

¹⁰¹⁴ Rankin, M. D. and Richardson, D. R. ‘The Offshore Drilling Contract-Operator and Contractor Perspectives’, *IADC/SPE 1983 Drilling Conference*, New Orleans, Louisiana, February 20–23, 1983. Texas, USA: Society of Petroleum Engineers, 1– 8, at p. 2.

¹⁰¹⁵ See generally, Austen-Baker, R. (2017) *Implied Terms in English Contract Law*. Edward Elgar Publishing.

is no list of obligations or risks that fall under the purview of the doctrine of *tradition*, it is possible to deduce some of them by reference to sustained practice by contract parties.

Thus, it is customary, for instance, to expect that the drilling contractor would supply the drilling unit, together with most of the crew required to carry on the drilling operations, while the operator would furnish the drilling mud, coring equipment, storage tanks, testing and completion services, as well as the requisite equipment.¹⁰¹⁶

In the same vein, whichever party was responsible for providing any equipment or personnel traditionally bore the risks associated with that provision. Although it is recognised that this may not always be true for all circumstances, this approach was said to represent the ‘base case’ which was present in the drilling contract market place, regulating the drilling contract relationship, much in the same manner that the market forces of demand and supply regulate price and output.¹⁰¹⁷

A parallel can be drawn between the doctrine of tradition and the risk allocation method discussed in the bedrock section. The hallmark of the bedrock is the default risk allocation method that bore the fault element. Essentially, liability was imposed based on responsibility, which coincided with risk upon the occurrence of the adverse event. However, the difference between them is the fact that the bedrock applied by default to the contract parties whether or not they consented to it, while the doctrine of tradition is still based on the will of the parties, and industry practice, which supposedly evolved over time.

Even though the doctrine of tradition is only persuasive in nature, there may be repercussions attendant upon allocating risk in a manner that goes contrary to its dictates. Undoubtedly, if a

¹⁰¹⁶ Anderson, O. L. (1989) ‘The Anatomy of an Oil and Gas Drilling Contract’, *supra*, at p. 395.

¹⁰¹⁷ Rankin, M. D. and Richardson, D. R. ‘The Offshore Drilling Contract-Operator and Contractor Perspectives’, *Op.Cit.*, at p. 2.

contract party takes on risk that should traditionally be borne by the other party, then the former would need to take additional steps to ensure that they are able to meet the obligations required by that risk allocation. In most cases, this would mean deploying resources and taking out insurance which they would not ordinarily require, and subsequently internalise this in the cost of the contract, inevitably increasing this cost. This is admittedly a ‘lose – lose’ situation for both parties, whether or not they realise – or even acknowledge – this fact.

4.3.1.2 Doctrine of Best Knowledge

This doctrine stipulates that risk should be allocated to the contract party who is most knowledgeable about the specific risk, and better placed to avoid legal action ensuing therefrom.¹⁰¹⁸ It is epistemological in approach, and knowledge here would typically be gained from experience relating to risk events, processes and procedures, geographical considerations and specificities.

The doctrine of best knowledge finds philosophical support in the previous discussion on the distinction between *risk* and *uncertainty*.¹⁰¹⁹ The thrust of the doctrine is to avoid legal action that arises from lack of knowledge about the specific risk subject-matter and, by so doing, eliminate, or at least reduce, the uncertainty that ordinarily characterises risk. Writers such as Althaus¹⁰²⁰ recognise that knowledge mitigates the ‘unknown’ factor in risk, and attempts to control the randomness that would otherwise ensue. Indeed, in Rumsfeld’s ‘unknown unknowns’,¹⁰²¹ the infusion of knowledge into the specific context would re-characterise the

¹⁰¹⁸ *Ibid*, at p.3.

¹⁰¹⁹ Under the heading ‘Risk and Uncertainty’.

¹⁰²⁰ Althaus, C. E. (2005) ‘A Disciplinary Perspective on the Epistemological Status of Risk’, *Risk Analysis*, 25(3), at pp. 567– 588.

¹⁰²¹ Seely, H. (2010) *Pieces of intelligence: The Existential Poetry of Donald H. Rumsfeld*. Simon and Schuster, *supra*, at p. 2.

mantra to ‘known known’ or ‘known unknown’, both of which demonstrate a better grasp of the risk situation. The same would be true of Taleb’s *Black Swan* event.¹⁰²²

Thus, allocating the risk of an unsound well location to the operator, for instance, is based on their expected knowledge of the well site, garnered from the results of the geotechnical survey of the seabed conditions of the well location prior to the arrival of the drilling rig. Likewise, allocating the risk of loss or damage of the drilling unit to the contractor is consistent with the doctrine of best knowledge as no other party can claim to know the drilling unit better than the contractor.

Indeed, the cost of allocating risk to a party who lacks requisite knowledge about the subject matter or responsibility can be very dire. In *Callon Petroleum Co v Big Chief Drilling Co*,¹⁰²³ the responsibility and risk of ensuring a sound location were allocated to the operator, who procured the services of a third party for this purpose. However, the contractor unilaterally altered the location approved by the operator, resulting in a significant increase in the cost of the directional drilling. It was held that the contractor had, by that action, assumed the risk of ensuring a sound well location, which it had failed to do, and was thus responsible for bearing the economic consequences of the failure to do so.

4.3.1.3 Doctrine of ‘Clay Feet’

This doctrine stipulates that the contract party who is under a legal obligation to perform or refrain from performing an act, the breach of which would attract legal action and/or sanction, should bear the economic consequences of the occurrence of the legal action or imposition of

¹⁰²² Taleb, N. N. (2007), *The Black Swan: The Impact of the Highly Improbable*. Random House.

¹⁰²³ 548 F.2d 1174 (5th Cir. 1977).

the sanction.¹⁰²⁴ The doctrine's premise is that a legal obligation cannot be outsourced or transferred. Legal obligations are typically imposed by statute or other subordinate legislation, together with the sanctions applicable upon a breach, which would usually be targeted at the obligor.

Thus, where for instance, as previously discussed, the operator bears the legal responsibility of obtaining the requisite drilling permits and the risk of non-compliance,¹⁰²⁵ this doctrine ordinarily presupposes that they are unable to allocate this risk by contract to the contractor. This would also imply that the obligor is unable to share the risk with the other party, neither are they legally able to allege contributory negligence in respect of the legal obligation.

However, there is evidence that contract parties have purported to allocate risks arising from legal obligations and statutory duties using indemnities and exclusion clauses. This practice has also been judicially recognised and approved. In *Persimmon Homes Ltd v Ove Arup and Partners Ltd*,¹⁰²⁶ it was held that contractual releases will be enforced for breaches of statutory duty if the parties express that intent. Provided the contractual provisions are clear, then the courts will enforce that as being the agreed risk allocation method of the parties. This position is different from that adopted by the court in the Transocean/BP litigation,¹⁰²⁷ in which the court held that the release given by BP to Transocean even for gross negligence and strict liability will be enforceable in respect of third-party *compensatory* damages claims, but will be unenforceable in respect of *punitive* damages based on public policy considerations.¹⁰²⁸

¹⁰²⁴ Rankin, M. D. and Richardson, D. R. 'The Offshore Drilling Contract-Operator and Contractor Perspectives', *Op.Cit.*, at p. 3.

¹⁰²⁵ Under the heading 'Licences and Authorisations'.

¹⁰²⁶ (2017) EWCA Civ 373.

¹⁰²⁷ Case 2:10-md-02179-CJB-SS Document 5446, *Op.Cit.* at pp.10–19.

¹⁰²⁸ *Ibid.*, at pp 18–19.

To reconcile the different approaches taken by the UK and USA courts, this study posits that, as between the relevant statutory authority and the contract party-obligor, the legal obligation remains where it falls. Thus, the operator, for instance, would always be answerable to the state if it fails to obtain a relevant drilling permit. However, contract parties are not precluded from allocating risks between themselves as they deem fit as a corollary to that. Hence, the legal obligor could answer directly to the government authority, and then require the contractual obligor to recompense for the loss.

This position also seems to have judicial support as can be seen from the decision in *Caledonia North Sea Ltd v London Bridge Engineering Ltd*.¹⁰²⁹ In this case, the court found that the operator of an offshore oil and gas production platform is made responsible for any death or personal injury that occurred from radioactivity pursuant to the Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976 (SI 1976/1019).¹⁰³⁰ Pursuant to these regulations, the operator settled the claims relating to the fatalities that occurred on 6 July 1988 on the Piper Alpha oil platform. Thereafter, it sought indemnification from the contractor in respect of the payments relating to their own staff who also died in the explosion based on the knock-for-knock indemnity structure contained in their drilling contract. The House of Lords had no difficulty in finding for the operator, its rationale being that nothing precluded the operator from recovering in these circumstances since the contractual provision was clear and unequivocal.¹⁰³¹

4.3.1.4 Doctrine of Accountability

¹⁰²⁹ (2002) UKHL4; (2002) 1 Lloyd's Rep 553, HL.

¹⁰³⁰ These Regulations were made pursuant to the Mineral Workings (Offshore Installations) Act 1971.

¹⁰³¹ *Caledonia North Sea Ltd v London Bridge Engineering Ltd* (2002) UKHL 4; (2002) at paras 13–15.

This doctrine focuses on the contract party in control of the process that gives rise to legal proceedings, and states that this party should be allocated the risk of the occurrence of the harmful event emanating from the process.¹⁰³²

The thrust of the doctrine immediately highlights the distinction between *accountability* and *responsibility*, and confirms the study's position that responsibility does not always coincide with accountability, as far as risk allocation is concerned. Indeed, a contract party may be in 'control' of a certain procedure, but may not be responsible for physically carrying out the required task. This is the scenario where the operator is allocated the risk of blowout, fire, explosion, cratering or any uncontrolled well condition as well as damage to the reservoir or geological formation. This allocation is typical, notwithstanding the fact that the contractor is responsible for the physical drilling operations.

The question then arises as to how to establish 'control', and which of the parties is seised of this in respect of a given procedure. The issue of control was dealt with in Chapter 3¹⁰³³ in respect of *vicarious liability* of an employer, as one of the tests for distinguishing between an employee and an independent contractor. The control test highlights the employer's ability to direct the way in which tasks were undertaken.¹⁰³⁴

Still under Chapter 3, the issue of 'control' was also discussed in determining who an *occupier* of premises was. The courts applied a *control* test, such that anyone who exercised a degree of occupational control over premises was regarded as the occupier; the greater the degree of this control by an individual, the more likely the finding that the latter is the occupier.¹⁰³⁵

¹⁰³² Rankin, M. D. and Richardson, D. R. 'The Offshore Drilling Contract-Operator and Contractor Perspectives', *supra*, at p. 3.

¹⁰³³ Under the heading 'Whiteacre Undertakes Task X for Blackacre – Through an Employee or Third Party'.

¹⁰³⁴ See, for instance, *Short v J&W Henderson Ltd* (1946) 79 LI. L. Rep. 271.

¹⁰³⁵ *Wheat v E Lacon & Co Ltd* (1966) 1 All ER 582, in which the 'occupier' was defined as a 'convenient label for the kind of relationship that gives rise to a duty of care'.

The common denominator between these discourses is the enquiry into the directing mind of the subject endeavour. Where it is established that a separate entity directed the affairs constituting a specific subject matter, that entity remains accountable, even though the instructions were carried out by another entity. Most drilling contracts make it an obligation of the contractor to comply with lawful instructions issued by the operator. This puts it beyond contention that the operator is the directing entity, which may be the reason why contractors seek to allocate the majority of the risks to it – (the operator) – and only accept for themselves – (the contractors) – the remainder of the risks that they traditionally own and for which they can obtain insurance.¹⁰³⁶

4.3.2 Risk Allocation Rationales based on Legal/Economic Considerations

There are other rationales that, by their thrust and content, seem to have emerged from legal/economic considerations. These focus on the optimality of risk allocation with the aim of ensuring that risk is allocated in the most efficient way possible in the circumstances. They proceed on the premise that, like every other resource that is capable of being allocated, risk can create inefficiencies if allocated sub-optimally, thereby creating a deadweight loss or allocative inefficiency.

4.3.2.1 Party Best Able to Bear the Risk

The concept of the party who is best able to bear a specified risk subsumes several elements, each of which aids in understanding the relative positions of each contract party, and how allocative efficiency can be achieved through the way in which they allocate contractual risk. According to Posner, the party who is best able to bear a given risk is the party who can bear it

¹⁰³⁶ See, generally, Warren, T. 'The Operator-Contractor Relationship – Contract Changes, 1982 to 1984'. *SPE/IADC Drilling Conference*: Society of Petroleum Engineers. See also Hewitt, T. (2008) 'Who is to Blame? Allocating Liability in Upstream Project Contracts', *Journal of Energy & Natural Resources Law*, 26(2), pp. 177–206, at p. 181.

cheapest.¹⁰³⁷ In this study's construct, this means placing the obligation to bear the economic consequences of the occurrence of a given event on the party who can deal with this more cost-effectively.

Perhaps the most critical factors in risk bearing from a cost perspective are the *availability* and *cost* of insurance. Taken together, these factors would determine the contract party who is best able to insure. Insurance undoubtedly increases the contract cost, and one way of keeping the contract cost effective is to ensure that the party that can procure the lower cost insurance is allocated the relevant risk. There is evidence that contract parties can engage in risky commercial ventures once they can procure insurance to cover it, however, the insurance procured in these circumstances may not always be optimal.¹⁰³⁸ This is the result when a party that is not in the best position to insure takes on the relevant risk, thereby creating cost inefficiency in the contract. To avoid this, the party with the comparative insurance advantage should be allocated the risk, which is the reason why contractors often insist that the operator assume all risks relating to the well, as contractors are not best able to procure insurance for these purposes.¹⁰³⁹

The foregoing notwithstanding, the determination of the contract party that is best able to bear the risk goes beyond the determination of the party that is best able to insure. Importantly, it calls into question the *capacity* of a party to bear a given risk.¹⁰⁴⁰ In this context, *capacity* is determined by access to, or ownership of, resources with which to deal with the risk, if it eventuates. This would entail having the right level of expertise and authority, as well as the

¹⁰³⁷ Posner, R. A. (1986), *supra*, at p.44.

¹⁰³⁸ See, generally, Arrow, K. J. (1992) 'Insurance, Risk and Resource Allocation', *Foundations of Insurance Economics*: Springer, at pp. 220–229.

¹⁰³⁹ See, for instance, Moomjian, C. A. (1999) 'Contractual Insurance and Risk Allocation in the Offshore Drilling Industry', *Drilling Contractor*, March/April at p. 14.

¹⁰⁴⁰ Loosemore, M. and McCarthy, C. (2008) 'Perceptions of Contractual Risk Allocation in Construction Supply Chains', *Journal of Professional Issues in Engineering Education and Practice*, 134(1), at pp. 95–105.

resources with which to implement other risk management strategies that ensure that contract objectives are met.¹⁰⁴¹

Undoubtedly, capacity to meet the exigencies of the occurrence of an adverse event is paramount from the contractor's perspective, which is why, for instance, they tend to reject being allocated the risk of blowouts, cratering, pollution emanating therefrom, or any other well control events. The rationale remains their lack of capacity to deal with the economic consequences of these events when they occur. It is doubtful, for instance, that Transocean could have paid \$21 billion that BP has so far had to settle for the post-Macondo litigation, or whether it could have found an insurer willing to cover it for that liability.¹⁰⁴²

4.3.2.2 Overall Efficiency Rationale

There are other parameters that contribute to transactional efficiency which also serve as rationales for deciding the way in which risk could be allocated between contract parties. One such parameter is risk diversification – and this entails an enquiry into which party is best able to diversify risk more cost-effectively by spreading risk out into various undertakings to avoid exposure to the adverse effects of any one endeavour – and who can best avoid the cost of financial distress if the risk event happens.¹⁰⁴³ This rationale is premised on the assumption that a party that has the capacity to mitigate risk volatility, given the breadth of their assets or investment relative to the specific risk, should be allocated that contractual risk.

It is on this basis, for instance, that contractors bear the responsibility for the economic consequences of any damage to the drilling unit. The thinking is that the contractor owns

¹⁰⁴¹ *Ibid*, at p.95.

¹⁰⁴² Gilblom, K. and Jordan, A. (2018) 'BP's \$60 Billion Gulf Spill Tab Rises as Lawsuits Wind Down', *Bloomberg Quint*; Bloomberg LP. Available at: <https://www.bloombergquint.com/business/2018/01/16/bp-takes-1-7-billion-charge-on-deepwater-horizon-claims-closure>; accessed 21 January 2018.

¹⁰⁴³ *Ibid*, at p. 1014.

multiple rigs in respect of which they can procure good insurance deals, the discount of which can be internalised in day rates. Furthermore, because they are assumed to work for different clients simultaneously, they can leverage their entire contracts portfolio, deploying men, materials and technology across the fleet to optimise individual contracts.

Overall efficiency can be achieved only if contract parties co-operate and share information transparently about risk profile, risk appetite and insurance to aid this process. When parties fail to share information, or engage in misinformation or disinformation, this inevitably creates informational inefficiencies, eroding the possibility of achieving optimality.¹⁰⁴⁴ There is evidence that contract parties to a drilling contract sometimes engage in disinformation in circumstances where the balance of power and market conditions disfavour the party. For instance, a contractor who misinforms about their risk and insurance profile just to get work from the operator in a depressed rig market, may duly get work and accept risk that the operator allocates, even when they know that they cannot afford to bear the economic consequences of the occurrence of the adverse event.¹⁰⁴⁵ This would inevitably lead to a dispute if the risk event occurs, and litigation may ensue therefrom, a situation which is indicative of economic inefficiency as resources are deemed to have been sub-optimally allocated.

The value proposition of the contract parties would affect the manner of risk allocation, and impact the attainment of economic efficiency. For instance, a contract party might think that it is fair and equitable to allocate risk in a certain manner based on their preference and perceptions of fairness and equity, while the other contract party might focus on market conditions, seeking to maximise whatever benefits it presents, to allocate risk in a different manner.¹⁰⁴⁶ Thus, where

¹⁰⁴⁴ Diamond, P. A. (1974) 'Posner's Economic Analysis of Law', *The Bell Journal of Economics and Management Science*, 5(1), at pp. 294–300.

¹⁰⁴⁵ Warren, T. 'The Operator-Contractor Relationship – Contract Changes, 1982 to 1984'. *SPE/IADC Drilling Conference*: Society of Petroleum Engineers, at p. 3.

¹⁰⁴⁶ Houston, C. E. and Sunstein, C. R. (1998) 'Risk Assessment, Resource Allocation, and Fairness: Evidence from Law Students', *J. Legal Educ.*, 48, pp. 496–523, at pp 497–498.

an operator seeks to take advantage of a weak rig market to allocate the risk of loss of, or damage to their equipment, or to the reservoir, to the contractor, the implication is that the latter then assumes the position, not only of driller, but also of insurer, thereby creating a distortion in the overall efficiency of the contract.

4.3.2.3 Economic Benefit Rationale

This rationale proceeds on the basis that the contract party that stands to reap the benefit of any specific procedure should be allocated the risk arising therefrom as well. It has its roots in the *benefit principle*, a concept of taxation which states that those who benefit more from expenditure by the government ought to pay higher taxes to support that expenditure.¹⁰⁴⁷ This principle is the conceptual equivalent of the *benefit* rationale discussed in Chapter 2 on *vicarious liability*,¹⁰⁴⁸ which suggests that the employer who benefits from the employee's services, should also bear the burden of any wrongful act that results therefrom, as one cannot purport to take a benefit without the corresponding responsibility.¹⁰⁴⁹ Furthermore, it is underpinned by the theory of *risk* and *reward*,¹⁰⁵⁰ which posits that parties, as rational people, will accept higher risk provided this translates into higher profits, which exceed the cost of capital attendant upon the increased risk.

The *economic benefit* principle justifies the typical position adopted by contractors who posit that the majority of the risks arising from the drilling contract should be allocated to the operator

¹⁰⁴⁷ See, generally, Oakland, W. H. and Testa, W. A. (1996) 'State-Local Business Taxation and the Benefits Principle', *Economic Perspectives-Federal Reserve Bank of Chicago*, 20, at pp. 2–18.

¹⁰⁴⁸ Under the heading 'Whiteacre Undertakes Task X for Blackacre – Through an Employee or Third Party'.

¹⁰⁴⁹ *Viasystems (Tyneside) v Thermal Transfer (Northern)* (2006) QB 510.

¹⁰⁵⁰ See, for example, Burke, M., Nicholas P., (2010) 'Risk versus Reward Capital Markets: Indonesia Dispute Resolution'. 29 Int'l Fin. L. Rev. 25 2010–2011, p. 25; Millage, A. (2007) 'Risk and Reward', *The Internal Auditor*, 64(5), p. 6; Albion, M. S. (2008) *More Than Money: Questions Every MBA Needs to Answer: Redefining Risk and Reward for a Life of Purpose*. San Francisco: Berrett-Koehler Publishers; Quartz, S. R. (2009) 'Reason, Emotion and Decision-Making: Risk and Reward Computation with Feeling', *Trends in Cognitive Sciences*, 13(5), at pp. 209–215.

who stands to benefit economically from production in the oilfield – assuming that commercial discovery and development have occurred – in which they have proprietary interest long after the drilling contractor has exited the scene.¹⁰⁵¹ In addition, when contract parties allocate the risk of consequential losses on a knock-for-knock basis, essentially stating that each party bears their losses, this is a tacit validation of the *economic benefit* principle. The definition of consequential losses ordinarily encompasses ‘loss of profit’; the profit element is the economic benefit that parties ordinarily intend to obtain pursuant to the contract. Where profit is lost in a manner anticipated by the contract, the *economic benefit* principle requires that parties respectively absorb this, in the same manner as they would have benefited had drilling operations gone according to, or better than, plan.

4.3.2.4 Foreseeability Rationale

This rationale posits that risk should be allocated to the party who is best able to foresee the potential adverse events that could occur, and is able to act to avoid the risk events from occurring.¹⁰⁵² From this perspective, risk allocation should ultimately be about parties allocating the economic consequences of the occurrence of events between themselves in a manner that ensures allocation to the party who is best able to manage the likelihood of the occurrence of the event and, if it occurs, the economic consequences of the event occurring.

Foreseeability rationale is premised on sufficient knowledge and experience of the subject matter covered by the allocated risk, especially relating to procedures, resources, potential pitfalls and challenges. It also presupposes that the contract party possesses adequate resources to prevent

¹⁰⁵¹ See, for instance, Moomjian, C. A. (1999) ‘Contractual Insurance and Risk Allocation in the Offshore Drilling Industry’, *Drilling Contractor*, March/April at p. 14.

¹⁰⁵² Atiyah, P. S. (1990) *Essays on Contract*. Oxford University Press, at p. 36.

the foreseen risk from eventuating, and assumes that the risk is truly foreseeable, as a party can be relieved from the consequences of their breach if the promisee's losses were unforeseeable.¹⁰⁵³

However, there must be an incentive for the contract party to invest in mitigation and avoidance measures that address the risk event. From an *efficiency* perspective, the cost of mitigation must be lower than the cost of the risk occurring, otherwise it becomes more efficient to allow the adverse event to occur, and then deal with the economic consequences of its occurrence. The incentive may also arise if both *foreseeability* and *likelihood of occurrence* are high,¹⁰⁵⁴ prompting the obligor-contract party to act to prevent it from occurring.

The courts have opined that the risk of any event which could be foreseen, should be allocated by the contract parties, as its occurrence would not excuse performance.¹⁰⁵⁵ However, contract parties are not always able to foresee future events, the occurrence of which may be unintended and unforeseeable. For these situations, parties insert the *force majeure* clause in their contracts which essentially allocate risks to lie where they fall, each party bearing whatever proportion of the adverse event that occurred is attributable to them as losses.

Conclusion

The foregoing sections have focused on the contractual response to the fault-based risk allocation regime by contract parties. This response was predicated on the harshness of this regime and the conflict with the manner in which parties would have allocated the responsibility of bearing the economic consequences of the occurrence of the adverse events if they had adverted their minds to it. The rationale for the different responses examined above range from commercial expediency to cost optimisation; contract parties wanted to exercise their *freedom of contract* in

¹⁰⁵³ *Hadley v Baxendale* (1854) 9 Exch. 341.

¹⁰⁵⁴ Posner, R. A. (1986), *supra* at p. 82.

¹⁰⁵⁵ *Transatlantic Financing Corp v United States* 363 F.2d 312 (D.C. Cir. 1966).

a way that served their purposes rather than leave this to the discretion of the court, which the parties had already found to be unsatisfactory.

However, in exercising this freedom, contract parties sometimes went overboard, failing to take into cognisance the overarching effect of their actions and preferences on the wider society, members of which were the unwilling sufferers of these excesses. Where the way the economic consequences of the occurrence of an event is being allocated could create a disequilibrium in society, and/or otherwise threaten societal cohesion, legislative intervention is seen as necessary to safeguard the public space from perceived negative private interests and opportunistic behaviour. The nature of this intervention is examined in the next chapter.

Chapter 5

LEGISLATIVE INTERVENTION IN CONTRACTUAL RISK ALLOCATION

5.1 Anti-Indemnity Legislation

Dissatisfied with the manner in which contract parties sought indemnification, certain states in USA enacted anti-indemnity statutes.¹⁰⁵⁶ These statutes forbid indemnification against death, injury or damage caused by the indemnitee's negligence, and expressly void any provision in any agreement under their purview which purports to circumvent and/or defeat the prohibitive aim of the legislation.¹⁰⁵⁷ These statutes arose from perceived public policy concerns about weaker contractual parties who were made to indemnify stronger parties for the latter's own negligence, due to the former's weak bargaining position. This also imposed unwarranted financial obligations on the weaker parties, further justifying legislative intervention. The wording of the anti-indemnity statutes is nearly identical in explaining the types of indemnity agreements which are unenforceable.¹⁰⁵⁸ For instance, the Louisiana Act provides as follows:

‘Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent Contractor who is directly responsible to the indemnitee’.¹⁰⁵⁹

¹⁰⁵⁶ The Wyoming Act (Wyo. STAT. §§ 30-1-131 to -133 (1983); the New Mexico Act (N.M. STAT. ANN. § 56-7-2 (1986); the Louisiana Act (LA. Rnv. STAT. ANN. § 9:2780 (West Supp. 1989); the Texas Act (TEX. CIV. PRAC. & REM. CODE §§127.001 – 127.007).

¹⁰⁵⁷ See, for instance, the Louisiana Oilfield Anti-Indemnity Act ('LOAIA'), La. Rev. Stat. 9:2780(g).

¹⁰⁵⁸ Redfearn R. J., (2005) 'Oilfield Anti-Indemnity Acts and Their Impact on Insurance Coverage: A Comparative Analysis', *supra*, at p. 1.

¹⁰⁵⁹ LA. Rnv. STAT. ANN. § 9:2780 (A) (West Supp. 1989).

For the statutes to apply, certain conditions need to be satisfied. First, the subject matter must relate to ‘agreement pertaining to wells for oil, gas, or water or to a mine for a mineral’.¹⁰⁶⁰ As straightforward as this sounds, this provision has been the reason for a lot of litigation, all geared towards determining whether specific agreements fall within the scope of the statutes. Indemnitors who are required to indemnify another party for the latter’s own negligence have an incentive to bring the agreement within the scope of the statutes. For instance, in *Gainsco Insurance Co v Amoco Production Co*,¹⁰⁶¹ the court held that delivering oil by truck to a tank battery is not an activity closely related to well drilling, and so was not caught by the provisions of the Wyoming statute. The court came to the same conclusion in *Reliance Ins Co v Chevron USA, Inc*,¹⁰⁶² in which it held that an agreement to dig pits to collect waste fluids emanating from a fire that ensued at a gas separation facility did not fall within the scope of the Wyoming statute, even though the facility processed gas for reinjection for artificial lift and well pressure maintenance. In both cases, the courts upheld the indemnity provisions that indemnified for own negligence, leaving the indemnitors with the burden of bearing the economic consequences of the occurrence of the adverse events caused by the indemnitees’ negligence.

Secondly, the agreement must seek to indemnify a party against its own negligence. Thus, where the negligence complained about was caused by the indemnitor rather than the indemnitee, the relevant provisions of the statutes were not triggered. In this regard, the mere fact that an indemnity provision exists in an agreement falling within the scope of the statutes does not automatically invalidate it. This point was emphasised in *Cities Serv Co v Northern Prod Co*,¹⁰⁶³ which also stated that even where both the indemnitor and indemnitee were concurrently

¹⁰⁶⁰ See, for instance, § 127.001 of the Texas Act (TEX. CIV. PRAC. & REM. CODE). This section also provides a detailed definition of ‘well or mine service’.

¹⁰⁶¹ 2002 WY 12253 P.3d 1051.

¹⁰⁶² 713 P.2d 766 (Wyo. 1986).

¹⁰⁶³ 705 P.2d 321, 329 (Wyo. 1985).

negligent, the indemnity would be invalid to the extent of the indemnitee's negligence, and by the same token, be valid to the extent of the indemnitor's negligence.¹⁰⁶⁴

The condition that the agreement must seek to indemnify a party against its own negligence is itself subject to the *fair notice* principle, laid down in *Spence & Howe Constr Co v Gulf Oil Corp*,¹⁰⁶⁵ to the effect that it is only right that a party who is exposed to assuming significant risk on behalf of the other party, even in circumstances of that other party's negligence, should be put on notice. This principle is made up of two other principles: the *express negligence* principle, which was established in *Joe Adams & Son v McCann Constr Co*,¹⁰⁶⁶ and states that the intent to indemnify a party against its own negligence must be clear and unequivocal; and the *conspicuousness* principle, which requires the indemnity provision to be conspicuously displayed in the contract to avoid injustice that would be occasioned by the indemnitor not actually distinguishing the provision from other provisions in the contract.¹⁰⁶⁷ In *Dresser Industries, Inc v Page Petroleum, Inc*,¹⁰⁶⁸ the Texas Supreme Court clarified that the standard of conspicuousness required was the same as that contained in the *Uniform Commercial Code*.¹⁰⁶⁹ These measures are taken to ensure that the parties fully understand and accept the nature of obligations to which they intend to sign up in the contract, and can be traced to the legislature's intent to intervene to prevent injustice and unfairness being meted out to contract parties in weaker bargaining positions. Thus, even in circumstances where indemnification for own negligence would be valid, the *fair notice* principle ensures that this intent is not only unequivocal but also distinctly communicated and accepted by contract parties.

¹⁰⁶⁴ See also *Accord Tipton v Texaco, Inc*, 103 N.M. 689, 696-97, 712 P.2d 1351, 1358-59 (1985).

¹⁰⁶⁵ 365 S.W.2d 631, 634 (Tex. 1963).

¹⁰⁶⁶ 475 S.W.2d 721, 723 (Tex. 1971).

¹⁰⁶⁷ Laid down in *K & S Oil Well Servs, Inc v Cabot Corp Inc*, 491 S.W.2d 733, 738 (Tex. Civ. App.-Corpus Christi 1973, writ ref'd n.r.e.). It was held that an indemnity provision which is surrounded by unrelated contract provisions did not meet conspicuousness standard).

¹⁰⁶⁸ 853 S.W.2d 505 (Tex. 1993).

¹⁰⁶⁹ (TEX. BUS. & COM. CODE ANN. § 1.201(10) (Tex. UCC) (Vernon 1968).

Thirdly, the statutes only cover certain heads of liability or losses.¹⁰⁷⁰ In general, the heads of losses and liability covered are death or personal injury, as well as property damage. However, there are differences in the specific heads of losses and liability covered by the respective statutes. For instance, while the Louisiana statute covers liability or loss arising from bodily injury or death,¹⁰⁷¹ the Wyoming and New Mexico statutes also cover injury to property.¹⁰⁷² Furthermore, even within the heads of losses and liability covered, the statutes also specify and exclude losses and liability from certain sources from its scope. For instance, the Texas statute does not prohibit indemnity agreements for personal injury, death, or property injury resulting from radioactivity and pollution, reservoir or underground damage. It also does not apply to death or property injury resulting from services to control a wild well either to protect the safety of the general public or to prevent depletion of vital natural resources.¹⁰⁷³

Given the scope of the exemptions from the application of the statutes, this study notes that contract parties retain the ability to provide for indemnification for own negligence in respect of the occurrence of adverse events from the most critical aspects of the drilling process. For instance, the adverse events which typically result in the greatest numbers of fatalities and casualties during the drilling process are wild well events – that typically lead to fire and explosion – and radioactivity. An example is the Piper Alpha catastrophe that led to the death of 167 people – the highest number of fatalities ever recorded during offshore drilling, arising from fire and explosion fuelled by gas and radioactive substances.¹⁰⁷⁴ Thus, the curtailment of the intention to indemnify for own negligence by the anti-indemnity statutes has not totally prevented parties from evincing this intent and providing same in their contracts, especially with

¹⁰⁷⁰ §127.003 of the Texas Act (TEX. CIV. PRAC. & REM. CODE).

¹⁰⁷¹ LA. REV. STAT. ANN. § 9:2780B (West Supp. 1989).

¹⁰⁷² Subsections III(L)(b), (c), Wyo. STAT. §§ 30-1-131 to -133 (1983).

¹⁰⁷³ §127.004 of the Texas Act (TEX. CIV. PRAC. & REM. CODE).

¹⁰⁷⁴ The *Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976 (SI 1976/1019)* make the operator of an offshore oil and gas production platform responsible for any death or personal injury that occurs from radioactivity. See also *Caledonia North Sea Ltd v London Bridge Engineering Ltd* (2002) UKHL 4.

respect to the occurrence of adverse events that have potentially devastating impact on life and property.

Fourthly, the statutes exclude certain types of agreements from their scope of coverage – for example, joint operating agreements¹⁰⁷⁵ and farm-out agreements.¹⁰⁷⁶ Furthermore, the statutes also exclude agreements for the purchase and transportation of gas or natural gas liquids by pipeline or fixed associated facilities,¹⁰⁷⁷ as well as ‘construction, maintenance, or repair of oil, natural gas liquids, or gas pipelines’.¹⁰⁷⁸ A commentator has rationalised these exclusions by stating that the activities they cover are further removed from activities at the wellsite, notwithstanding that the transaction which is the subject of the agreement is somewhat connected to the oil and gas industry.¹⁰⁷⁹ This study posits that another rationale for these exclusions can be found in the mischief which the legislature wanted to cure, which was to address the perceived injustice that was meted out to significantly weaker parties, particularly contractors, in a commercial oil and gas transaction. The exclusions reflect activities and transactions which require parties to be of fairly equal bargaining power. For instance, joint operating agreements regulate co-venturers who have come together to pursue a common objective of exploiting hydrocarbons, each of whom freely determines his level of participation in the joint venture. It is unlikely that a party can be coerced or intimidated to participate in this venture, and the provisions¹⁰⁸⁰ of the JOA serve as an additional safeguard to ensure participation in accordance with the co-venturers intentions.

¹⁰⁷⁵ § 127.002 of the Texas Act (TEX. CIV. PRAC. & REM. CODE) rationalises this exclusion, *inter alia*, by holding that they are not contrary to public policy.

¹⁰⁷⁶ LA. REV. STAT. ANN. § 9:2780 (D)(2).

¹⁰⁷⁷ TEX. CIV. PRAC. & REM. CODE ANN. § 127.001(4)(B)(i) (Vernon 1986 & Supp. 1995).

¹⁰⁷⁸ TEX. CIV. PRAC. & REM. CODE ANN. § 127.001(4)(B)(ii) (Vernon 1986 & Supp. 1995).

¹⁰⁷⁹ White, H. H. (1996) ‘Winding Your Way Through the Texas Oilfield Anti-Indemnity Statute, the Fair Notice Requirements and Other Indemnity Related Issues’, *S. Tex. L. Rev.*, 37, pp. 161–192, at p. 167.

¹⁰⁸⁰ For instance, the provisions relating to voting rights.

Lastly, statutory exceptions apply where the indemnity obligation is supported by insurance coverage provided by the indemnitor, or in respect of mutual indemnities where each party provides cover for the other party in equal amounts, subject to statutory limits.¹⁰⁸¹ Again, this study posits that the rationale for these exclusions lies in the fact that a transaction cannot be said to be unjust or unfair if both parties bear the same economic burden to provide identical amounts of money to fund their respective indemnity obligations.

Where the provisions of the anti-indemnity statutes can be successfully invoked, their effect is to shift the risk allocation back to the party who sought to burden the other party with the economic consequences of occurrence of a specified event. Even in circumstances in which the anti-indemnity statutes have not been successfully invoked, there are still challenges with the enforcement of the indemnities. Sanchez identifies two such challenges as being *applicable law* as well as *whether the indemnity can indeed be enforced under the applicable law*.¹⁰⁸²

The first issue arises primarily when injuries occur offshore because different legislation¹⁰⁸³ have an impact upon the consequences of an injury that occurs offshore. Where a finding is made to the effect that a law other than the anti-indemnity statute applies in a given situation, the risk allocation of the parties is affected, and previous assumptions may be rebutted. A party may thus be left with risk thought to have been originally allocated under the relevant anti-indemnity statute.

¹⁰⁸¹ Combined effects of §§127.005 and 127.006 of the Texas Act (TEX. CIV. PRAC. & REM. CODE).

¹⁰⁸² Sanchez, L. (2006) 'Charting the Chaotic Offshore Waters: The Validity of Contractual Indemnity Provisions Pertaining to Injuries Sustained Offshore', *Tul. Mar. LJ*, 31, p. 177, at p. 178.

¹⁰⁸³ For instance, Outer Continental Shelf Lands Act ('OCSLA'), 43 U.S.C. § 1333(a)(2)(A) (1982 & Supp. II 1985); Longshoremen's and Harbor Workers' Compensation Act ('LHWCA'), 33 U.S.C. §§ 901-950 (1982 & Supp. III 1985); Admiralty Extension Act ('AEA') 46 U.S.C. app. § 740 (1982 & Supp. III 1985); Death on the High Seas Act ('DOHSA') 46 U.S.C. app. §§ 761-767 (1982 & Supp. M 1985); General Maritime Law of the USA; State law.

In making a finding of applicable law, the courts take into consideration the facts and circumstances of each transaction.¹⁰⁸⁴ In *Theriot v Bay Drilling Corp.*,¹⁰⁸⁵ the court held that the enquiry would be largely dependent on whether a ‘vessel’¹⁰⁸⁶ is utilised for the operation in question. The nature of the operations performed, as well as the location of the vessel, will also affect the applicable law.¹⁰⁸⁷

The second issue as to whether an indemnity can be enforced under the applicable law can then be resolved once a finding has been made on which law is actually applicable. This is by no means a straightforward process, and the analyses and outcomes from different courts are sometimes confusing.¹⁰⁸⁸ Indeed, Sanchez characterises the current situation of determining the enforceability of indemnities under the anti-indemnity statutes as a ‘chaotic mess of statutes, legal tests, and facts’.¹⁰⁸⁹ Nevertheless, this study posits that it is a process that is worth undergoing each time there is a dispute, as the anti-indemnity statutes are crucial, not only because they ultimately allocate risk in a structured manner between parties to a contract, but they also serve as the mechanism through which power dynamics between the parties are balanced, inequalities in contract drafting are normalised, and the preservation of the core objective of public policy attained. The implication of this confusion on contractual certainty and predictability of outcomes is noted, however, the multiplicity of possible applicable legislation has created this situation, which can only be addressed and redressed by streamlining and clarifying this area of law to infuse greater certainty and confidence.

¹⁰⁸⁴ Schilling, E. T. (2001) ‘Demette v. Falcon Drilling Co: The Sinking Ship of Fifth Circuit Precedent Construing the Outer Continental Shelf Lands Act and Maritime Law’, *Tulane Law Review*, 76:1785; *Demette v Falcon Drilling Co*, 280 E3d 492, 503 (5th Cir.), reh ‘g en banc denied, E3d - (5th Cir. 2002).

¹⁰⁸⁵ 783 F.2d 527, 539 (5th Cir. 1986).

¹⁰⁸⁶ In offshore lingo, ‘vessel’ includes semisubmersible platforms, lift boats, self-elevating work-over platforms, and jack-up rigs.

¹⁰⁸⁷ *Smith v Penrod Drilling Corp*, 960 F.2d 456, 460, 1993 AMC 81, 185 (5th Cir. 1992).

¹⁰⁸⁸ Johnson, E. S. and Matherne, C. T. (1999) ‘Statutory and Contractual Indemnification and Forum Selection, Including the Oil Patch’, *Tul. Mar. LJ*, 24, pp. 85–124, at p. 123.

¹⁰⁸⁹ Sanchez, L. (2006), *supra*, at p. 198.

5.2 Unfair Contracts Terms Act, 1977

Background

This statute (UCTA 1977) is an example of a very direct legislative intervention to safeguard interests of consumers, whether these are individuals or businesses transacting as consumers. The Law Commission confirms that this intervention was made to prevent injustice that would be occasioned by a consumer's lack of understanding of the meaning of the contract clauses or even when he does, is precluded by his weak bargaining position from preventing its inclusion.¹⁰⁹⁰ Beale agrees, and states that a weak bargaining position can erode freedom of contract, even where a party has read and understood the purport and effect of an exemption clause.¹⁰⁹¹ Wilson and Bone suggest that this protection is also afforded businesses who deal as consumers, whether these are small or large businesses.¹⁰⁹²

The question then arises as to whether parties to an offshore drilling contract, who can be stated as dealing in the course of business, can be considered as consumers within the contemplation of the Act. Judicial attitude to this question has gone through different phases. Initially, courts were quite clear that the UCTA 1977 applied only to consumer contracts and not to commercial contracts generally.¹⁰⁹³ The rationale was the assumption that parties to commercial contracts were generally of equal bargaining power and so the courts should not interfere in the way they have allocated risks *inter se*.¹⁰⁹⁴

¹⁰⁹⁰ Law Com. No 69 (1975) *Law Commission's Second Report on Exemption Clauses*.

¹⁰⁹¹ Beale, H. (1978) 'Unfair Contract Terms Act 1977', *Brit. JL & Soc'y*, 5, at pp. 114 – 115.

¹⁰⁹² Wilson, S. and Bone, S. (2002) 'Businesses, Standard Terms and the Unfair Contract Terms Act 1977', *J. Obligations & Remedies*, 1, at pp. 29– 30.

¹⁰⁹³ White, A. (1997) 'Caveat Vendor? A Review of the Court of Appeal Decision in *St Albans City and District Council v International Computers Limited*', *The Journal of Information, Law and Technology (JILT)*, 3.

¹⁰⁹⁴ *Photo Productions Ltd v Securicor Transport Ltd* (1980) AC 827.

This attitude shifted when courts laid down the principle that a party would not be deemed to be ‘dealing in the course of business’ if it entered into a contract that was not in pursuit of its core business or, if it was related to it, did not occur with frequency or regularity that could lead to the conclusion that it was ‘dealing in the course of business’.¹⁰⁹⁵ This was in line with the provisions of the Act that pertain to when a party deals as a consumer, relative to another who is ‘dealing in the course of business’.¹⁰⁹⁶ The aim here was to expand the scope of transactions within the purview of the Act, enabling the test of reasonableness to be applied thereto.

The current position is that the courts are progressively finding reasons to intervene and apply the test of reasonableness, even when it is clear that both parties are dealing in the course of business. This was the case in *Salvage Association v CAP Financial Services Ltd*¹⁰⁹⁷ which centred on defective software, and the court applied the reasonableness test notwithstanding the fact that both parties were dealing in the course of business. Indeed, Lawson¹⁰⁹⁸ has advised businesses to recognise this trend and expect more judicial scrutiny even as courts expand the reach of the reasonableness test. In *Edmund Murray Ltd v BSP International Foundations Ltd*¹⁰⁹⁹, the transaction was for the supply of a drilling rig, yet the court held that the exclusion clauses¹¹⁰⁰ were unreasonable after subjecting them to the test of reasonableness.

In view of the current state of jurisprudence on this subject, as well as the demonstrated attitude of the courts, this study takes the position that offshore drilling contracts could be subject to the

¹⁰⁹⁵ White, A. (1997), *Op.Cit.*, at p.4.

¹⁰⁹⁶ Section 12, Unfair Contract Terms Act 1977.

¹⁰⁹⁷ (1995) FSR 654

¹⁰⁹⁸ Lawson, R. G. and Singleton, S. (2011) *Commercial Contracts: A Practical Guide to Standard Terms*. A&C Black. See also Lawson R, (1995) ‘Business Contracts – the UCTA Test’ *The Commercial Lawyer*, October 1995 p. 29, cited in White, A. (1997), *supra*, at p.4.

¹⁰⁹⁹ (1992) Con LR 1.

¹¹⁰⁰ The clauses excluded liability for loss, injury or damage however caused. They also excluded liability for loss of profit or any other category of loss, however caused, as well as for breakdown of the equipment. See also *Lease Management Services Ltd v Purnell Secretarial Services Ltd* (1994) CCLR 127, in which the exclusion of liability was also held to be unreasonable.

test of reasonableness in the UCTA 1977. This is especially against the backdrop of the fact that some drilling companies are more powerful, wealthier and more influential than the operators they work for. This is especially true when small operators of marginal fields¹¹⁰¹ are considered. In this situation, it is hard to imagine that the parties would be ascribed equal bargaining power, and the courts may very well find reasons to intervene and subject exclusion clauses here to the test of reasonableness, especially given the fact that transactions in this situation would most likely be on the standard terms of the drilling company.

5.2.1 Discussion

The Act precludes reliance on exemption clauses in some specific circumstances, or limits recourse to this by subjecting the relevant clauses to the test of reasonableness. The focus of the Act is on contract terms that exclude or limit liability, and no overarching power is granted to the courts to strike down other terms of the contract on the basis of unfairness or because they are oppressive.¹¹⁰²

¹¹⁰¹ An oil field that does not generate sufficient net income or hydrocarbon to make it economical to develop at a specific reference point. The field may become more economically viable if economic or technical conditions change. It usually has a short lifespan before the field goes into decline.

¹¹⁰² Anson, W. R., Beatson, J., Burrows, A. S. and Cartwright, J. (2010), *supra*, at p. 193.

Broadly speaking, the Act regulates contract terms that exclude or limit liability for negligence,¹¹⁰³ breach of statute-implied terms in contracts for sale and supply of goods,¹¹⁰⁴ and breach of contract in consumer and standard form contracts.¹¹⁰⁵

In circumstances in which there is an absolute prohibition of recourse to an exemption clause, the application of the law is usually more straightforward, as the enquiry is only as to whether or not the events contemplated by the relevant section have occurred. It becomes more challenging when enforcement of clauses is dependent on satisfying the requirement of reasonableness.

Section 11(1) of the Act gives guidance on how reasonableness is assessed. Essentially, the courts will seek to determine whether, at the time of contract, and given the prevailing circumstances known or imputed to the parties, the term was a fair and reasonable one to include in their contract. It is clear from this provision that the test refers back to the time at which the contract was made and not when the liability results.¹¹⁰⁶ Thus, the gravity and/or extent of the liability does not determine the reasonableness or otherwise of the relevant term, unless this was, or ought to have been, foreseen by the parties at the time of making the contract.¹¹⁰⁷

Whenever the courts are called upon to rule on reasonableness, it is a largely subjective process, which they try to rationalise by resorting to guidelines. Thus, the Act lays down some guidelines

¹¹⁰³ Section 2(1), Unfair Contracts Terms Act 1977. This section prohibits the limitation or exclusion of liability for death or personal injury arising from negligence, while s.2(2) and (3) subject a limitation or exemption clause for any other type of loss/damage arising from negligence to the reasonableness test. See generally *Johnstone v Bloomsbury HA* [1992] QB 333.

¹¹⁰⁴ *Ibid*, at ss. 6 and 7. Section 6 prohibits the exclusion or limitation of liability for breach of the implied term as to title and subjects the exclusion or limitation of liability for breach of the implied terms as to fitness for purpose, merchantable quality and compliance with sample/description (See ss.12 – 15, Sale of Goods Act 1979) by sellers of goods to the test of reasonableness. Similarly, s.7 focuses on the same exclusions/limitations in respect of supply of goods covered by the Supply of Goods and Services Act, 1982. While s.7(2) prohibits the exclusion or limitation of liability for breach of the implied terms in circumstances where a party is dealing as a consumer, s.7(3) subjects the exemption clauses to the test of reasonableness when the dealing is otherwise than as a consumer.

¹¹⁰⁵ *Ibid*, at s.3 which applies to restrict the exclusion or limitation of business liability when a party deals as a consumer, or if the parties are utilising the standard terms of business of one of the parties.

¹¹⁰⁶ See, for instance, *Stewart Gill v Horatio Myer & Co* (1992) QB 600 at pp 607– 608.

¹¹⁰⁷ Anson, W. R., Beatson, J., Burrows, A. S. and Cartwright, J. (2010), *supra*, at p. 201.

to help the courts in making this assessment, among which is determining the relative bargaining positions of the parties, having regard to the alternative supply sources available to the customer.¹¹⁰⁸

The courts can form an opinion as to reasonableness, taking into consideration these guidelines, and indeed any relevant fact or circumstance that would assist the court in this regard. So, where, for instance, the court finds that the power structure between the parties is balanced, there is a greater likelihood that any clause which is the product of negotiations will be held to be reasonable, as courts are less prone to interfere in these circumstances.¹¹⁰⁹

Contract parties who seek to enforce exemption clauses bear the onus of proving reasonableness.¹¹¹⁰ In discharging this burden, parties are aware of the discretion that courts exercise in matters of this nature, and so it is not uncommon to find different opinions in the face of seemingly similar facts. Indeed, the attitude of higher courts is to uphold findings of lower courts in this circumstance, provided that they are not premised on faulty principles.¹¹¹¹

The relevance of the foregoing on risk allocation is to be noted. Where a party seeks reliance on an exemption clause which he thought offered protection on the occurrence of certain events, and which, in effect, allocated the risk of the economic consequences of that event occurring to another party, he would inevitably retain the obligation to deal with the economic consequences of the occurrence of the said event if the clause is either prohibited or struck down as being

¹¹⁰⁸ Section 11(2), Schedule 2, Unfair Contracts Terms Act 1977. Other guidelines include: (a) Whether the customer was induced to accept the term, or if he could have entered into another contract with less onerous terms; (b) Whether the customer knew that the term existed, or it could be imputed to him, from previous dealings and industry practice; (c) Whether the application of the exemption clause was conditional, compliance with which seemed likely at the time of contract; and (d) Whether the goods in question were customised for the customer.

¹¹⁰⁹ *Granville Oil and Chemicals Ltd v Davies Turner and Co Ltd* (2003) 1 All ER (Comm) 819 at para 31.

¹¹¹⁰ Section 11(5) Unfair Contracts Terms Act 1977.

¹¹¹¹ See *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 AC 803, at 810. In *Watford Electronics Ltd v Sanderson CFL Ltd* (2001) EWCA Civ 317, the Court of Appeal disagreed with a trial judge's finding of reasonableness, holding instead that the Appellant had not taken unfair advantage of the Respondent, as the latter could not validly claim to misunderstand the purport and effect of a clause excluding indirect losses.

unreasonable. However, such clauses have the effect of preventing a party against whom they are successfully invoked from enjoying contractual rights that they expected to have.¹¹¹²

Perhaps the more important emphasis, for the purposes of this study, should be placed on the exclusion or limitation of business liability¹¹¹³ if the parties are utilising the standard terms of business of one of the parties.¹¹¹⁴ This enquiry leads to the question as to when a transaction will be deemed to be based on the standard terms of business of one of the parties which will trigger the application of section 3 of the Act. Although 'standard terms of business' has not been defined by any court, different courts have postulated approaches to same. In *St Albans City and District Council v International Computers Ltd*,¹¹¹⁵ it was held that the written terms of the contract entered into by the parties will constitute the standard terms of the contract. However, this is not the same formulation as was reached by the court in *British Fermentation Products Ltd v Compair Reavell Ltd*,¹¹¹⁶ which requires express adoption or frequency of use. In *Salvage Association v CAP Financial Services Ltd*¹¹¹⁷, the court laid down different matters that should be considered in reaching a decision on whether a party is contracting on standard terms. The court stated, *inter alia*, that the extent to which a party foists his terms of business on the other party would be taken into consideration in determining whether they are standard terms. In *Yuanda (UK) Co Ltd v WW Gear Construction Ltd*,¹¹¹⁸ the court reached a decision on whether standard terms were used by considering the nature and extent of alterations that emerged in the aftermath of negotiations between the parties. More recently, in *African Export-Import Bank v*

¹¹¹² Palmer, N. and Yates, D. (1981) 'The Future of the Unfair Contract Terms Act 1977', *The Cambridge Law Journal*, 40(01), pp. 108-134, at p. 124.

¹¹¹³ 'Business liability' is defined in s.1(3) as 'liability for breach of obligations or duties arising (a) from things done or to be done by a person in the course of a business (whether his own business or another's); or (b) from the occupation of premises used for business purposes of the occupier; and references to liability are to be read accordingly'.

¹¹¹⁴ Section 3 Unfair Contracts Terms Act 1977.

¹¹¹⁵ (1997) FSR 251.

¹¹¹⁶ (1999) BLR 352.

¹¹¹⁷ (1995) FSR 654.

¹¹¹⁸ (2010) EWHC 720 (TCC).

Shebah Exploration and Production Co Ltd,¹¹¹⁹ the court held that the correct approach in determining whether a contract that contained portions of the written standard terms of business of one party, but not all, was caught by section 3 of the Act was to inquire whether there had been substantial variations to the standard terms that the party typically and habitually utilised. If there had been substantial variations, it was unlikely that a conclusion would be reached that the contract was based on that party's standard terms.

The different approaches postulated by the courts are indicative of the difficulty of defining 'standard terms of business'. Indeed, this difficulty was anticipated when both House of Commons and the House of Lords failed to agree on a precise definition, choosing instead to leave it to the courts to decide on an individual basis. Their rationale was that a definition would fail to cater to all circumstances in which business is undertaken, and would be unduly restrictive.¹¹²⁰ Given the reference to the courts, it is no surprise that different approaches will be developed, however, a central theme seems to have emerged in these different approaches. It is not enough that terms are used; those terms must be used in a manner that suggests that the purveyors consider them as their standard terms, either expressly or by their actions - such as the frequency of use and the preference not to deviate from same even if this is the other party's preference.

When standard terms are amended, perhaps pursuant to negotiations between the parties, the question as to whether the resulting terms will be regarded as 'standard', relative to the previous standard terms, is one of 'fact and degree'.¹¹²¹ The resulting terms will replace the previous terms and become the new 'standard' terms, if regularity and frequency of use can be established.¹¹²²

¹¹¹⁹ (2018) 1 W.L.R. 487; (2017) 2 Lloyd's Rep. 111.

¹¹²⁰ Wilson, S. and Bone, S. (2002) 'Businesses, Standard Terms and the Unfair Contract Terms Act 1977', *supra*, at p. 30.

¹¹²¹ *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd* (1991) 56 BLR 115, at pp. 131– 133.

¹¹²² *Ibid*, at pp. 131– 133.

Where parties have utilised the standard terms of a model contract that has been developed by a professional association or trade group, these will only be regarded as the ‘standard’ terms of the party who proposed the form of contract if it can be established that the party has adopted it as such, either expressly or by sustained practice.¹¹²³

It follows from the judicial position above that a party utilising any of the model offshore drilling contracts that form the basis for this study¹¹²⁴ can escape the reach of the Act (if English law is applicable), unless it can be imputed to that party as their standard terms of business. Even if they adopt only some of the terms of the model contracts, or conduct negotiations thereon, it becomes a question of fact as to whether the resulting terms materially differ from the original terms of the model contract.¹¹²⁵ If no significant difference is established between the two sets of terms, the parties will still be held as contracting on the terms of the model contract, and whether or not the terms will be regarded as ‘standard’ will depend on proof of regularity and frequency of use.

The question then arises as to what will constitute ‘regularity’ and ‘frequency’ of use of a model contract which will qualify it to be deemed as the ‘standard’ term of business of a party. This question has not been answered by the courts, and this study posits that it is one that must be determined by the facts and circumstances of each transaction. This conclusion is consistent with the treatment of similar notions;¹¹²⁶ it is also consistent with the mode of determining whether

¹¹²³ Wilson, S. and Bone, S. (2002), *Supra*, at p.31; *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) BLR 352.

¹¹²⁴ Mobile Drilling Rigs Contract, Edition 1 developed by Oil & Gas UK, through LOGIC, its not-for-profit wholly-owned subsidiary; daywork, footage and turnkey contract models developed by the International Association of Drilling Contractors (IADC) in the USA; and the CAODC/CAPP Master Daywork Contract developed by the Canadian Association of Oilwell Drilling Contractors (CAODC) and the Canadian Association of Petroleum Producers (CAPP).

¹¹²⁵ See, for instance, *The Salvage Association v CAP Financial Services Ltd* (1995) FSR 654.

¹¹²⁶ See for instance, the test of ‘sufficiency’ of evidence, as distinguished from ‘adequacy’ of evidence. The former is a question of fact, while the latter is a question of law; Jaffe, L. L. (1955) ‘Judicial Review: Question of Fact’, *Harv. L. Rev.*, 69, pp. 1020-1056.

the requirement of *reasonableness* - which goes to the core of the current discourse - has been satisfied, an enquiry that is also a question of fact consigned to the discretion of the court of first instance.¹¹²⁷

Flowing from the above, and given that parties can utilise model contracts without necessarily ‘adopting’ them as their standard terms of business,¹¹²⁸ a contract party who seeks to avoid the application of the test of reasonableness can achieve this objective simply by clearly disclaiming the intention to adopt the model contract as his standard terms of business. Indeed, to ensure that regularity or frequency of use is not established, there is a perverse incentive to make significant ‘modifications’ to the model contract, arising from negotiations in every contract transaction. It is logical to assume that the courts will find that there is no regularity or frequency of use if there are several drafts from the same source model contract.

Even when there is proof of regularity and frequency of use of a model contract, which suggests its adoption by a party as its standard terms, the courts have been reluctant to make pronouncements as to the application of the test of reasonableness thereto. Indeed, the court in *British Fermentation Products Ltd v Compair Reavell Ltd*¹¹²⁹ specifically and consciously refrained from answering the question as to the application of the test of reasonableness where a model contract has been established to be the standard terms of business of a party upon a finding of regularity of use.¹¹³⁰

In conclusion, it is fair to assume that parties who are minded to avoid the application of the test of reasonableness to model contracts have the ability to do so. Until a judicial pronouncement

¹¹²⁷ See *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 AC 803.

¹¹²⁸ *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) BLR 352.

¹¹²⁹ (1999) BLR 352.

¹¹³⁰ *Ibid*, per Judge Bowsher in para. 46.

is made one way or the other, parties to offshore drilling model contracts can escape the reach of the Act through creative and deliberate drafting.

5.3 Contracts (Rights of Third Parties) Act 1999

The treatment of third parties who had been conferred rights/benefits under a contract by the contract parties was unsatisfactory. Even though contract parties recognised that these rights/benefits existed, there was no structured mechanism for the third parties to exercise these rights or obtain the benefits. The dominant position of contract parties was backed by the doctrine of *privity of contract*, which effectively barred third parties from suing or being sued on these contracts as they were not parties thereto.

In view of the dissatisfaction with the stringent *privity of contract* regime,¹¹³¹ the Law Commission recommended changes in its report¹¹³² which led to the enactment of the Contracts (Rights of Third Parties) Act 1999.

The aim of this legislation is not to abolish the privity of contract principle, but to reform it by creating a statutory exception, essentially allowing third parties enforceable rights under contracts.¹¹³³ The primary way in which it does this is to stipulate circumstances in which the third-party is legally able to sue the promisor and enforce the promise contained in the contract conferring a benefit to him. However, it still preserves the rule that obligations cannot be imposed on third parties.¹¹³⁴

¹¹³¹ MacMillan, C. (2000) 'A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999', *MLR*, 63, p. 721. Macmillan documents Lord Denning, M.R.'s frustration with the privity doctrine, stating that he 'consistently questioned the existence of the privity rule in English contract law...'.
¹¹³² Law Commission (1991) *Privity of Contract: Contracts for the Benefits of Third Parties*, HM Stationery Office.

¹¹³³ Yeo, T. (2001) 'When Do Third Party Rights Arise Under the Contracts (Rights of Third Parties) Act 1999 (UK)', *Singapore Academy of Law Journal*, 13, p. 34, at p. 36.
¹¹³⁴ *Ibid*, at p. 36.

The intention of the contracting parties is paramount. Thus, they determine the nature and extent of the benefit conferred upon and enforceable by the third party. MacMillan sees the nature of this benefit as a gift that underpins the overarching aim of the Contracts (Rights of Third Parties) Act 1999, which is to give effect to the intention of the contracting parties.¹¹³⁵ This intention can be express or implied. Thus, according to the Act, the contracting parties can confer a benefit expressly stated as being enforceable by the third party,¹¹³⁶ or the term of the contract can *purport to confer* a benefit on the third party,¹¹³⁷ which the third party is able, or presumed to be able, to enforce if there is nothing in the contract that rebuts that presumption.¹¹³⁸ Roe suggests that the word ‘rebut’ is a misnomer, as the question as to the intention of the contracting parties in this circumstance is one that should be resolved by the court, and not by either of the parties, as he finds no formal burden of proof in this instance.¹¹³⁹

Roe, however, concedes that there are matters of fact within the knowledge of the parties relating to the intention of the contract term that contains the promise or benefit, which may themselves be in dispute. In this circumstance, he agrees that the onus would be on the defendant to prove that the parties did not intend the contract term to be enforceable.¹¹⁴⁰ Bridge adopts a different approach, stating that the onus is on the third party to prove that the contract term confers a benefit that was meant to be enforced, and then shifts to the promisor to rebut this thereafter.¹¹⁴¹ MacMillan, citing the Law Commission’s report, opines that the burden of proof is usually borne by contracting parties – especially the promisor – as they are better placed to explain what they intended by that contract term.¹¹⁴²

¹¹³⁵ MacMillan, C. (2000), *supra*, at pp. 723, 734.

¹¹³⁶ Section 1(1)(a), Contracts (Rights of Third Parties) Act 1999.

¹¹³⁷ *Ibid*, s. 1(1)(b).

¹¹³⁸ *Ibid*, s. 1(2).

¹¹³⁹ Roe, T. (2000) ‘Contractual Intention under Section 1 (1)(b) and 1 (2) of the Contracts (Rights of Third Parties) Act 1999’, *The Modern Law Review*, 63(6), pp. 887– 894, at p. 889.

¹¹⁴⁰ *Ibid*, at p. 889.

¹¹⁴¹ Bridge, M. (2001), *supra*, at p. 91.

¹¹⁴² MacMillan, C. (2000), *supra*, at p. 725, citing para. 7.18 of the Law Commission Report (*supra*).

As far as risk allocation is concerned, the third party is able to take the benefit of an exemption or limitation of liability clause only if he could validly do so if he were a party to the contract.¹¹⁴³

The Act permits this if the limitation of liability or exemption clause can be brought within the purview of defences and set-off,¹¹⁴⁴ if the contract clause granting the third-party this right is express in this intent.

The right of the promisee to seek protection of an exemption or limitation of liability clause, even against a third party, is one that is preserved, both by contract and the Act.¹¹⁴⁵ The promisor is further protected from the situation in which the third party could seek to block the enforcement of the exemption or limitation of liability clause on grounds of unreasonableness as contemplated by the Unfair Contracts Terms Act 1977.¹¹⁴⁶ The 1999 Act clearly stipulates that this recourse is not available against the promisor in circumstances where negligence has been alleged, such negligence constituting a breach of the promisor's obligation arising from the promise.¹¹⁴⁷

The combined effect of section 7(2) of the Contracts (Rights of Third Parties) Act 1999 and the rule that third parties cannot be burdened by contracting parties with obligations arising from their (contracting parties) contract means that all risks within the contract are still allocated only between the parties. This study finds that the Act¹¹⁴⁸ has not made a difference as far as contractual risk allocation is concerned, as the Act merely confers benefits on third parties

¹¹⁴³ Section 3(6), Contracts (Rights of Third Parties) Act 1999.

¹¹⁴⁴ *Ibid.*, at s. 3(3).

¹¹⁴⁵ *Ibid.* at s. 4.

¹¹⁴⁶ Section 2(2).

¹¹⁴⁷ Section 7(2), Contracts (Rights of Third Parties) Act 1999. This protection is only in respect of loss/damage arising other than from death or personal injury. Furthermore, where the parties agree to exclude and/or limit the third-party's liability, this will not be subjected to the same scrutiny of reasonableness under s. 2(2) of the Unfair Contracts Terms Act 1977. The promisee's rights against the promisor are preserved and not affected by s. 2(2) of the Unfair Contracts Terms Act 1977.

¹¹⁴⁸ Contracts (Rights of Third Parties) Act 1999.

without the associated risks. If the Act had conferred upon contracting parties the right to allocate risk to third parties who could claim and enforce a promise or benefit under the contract, this would have altered the risk allocation landscape and affected the dynamics of the relationship between the primary contracting parties and the ‘beneficiary’ third parties. For example, indemnities would have been required to be extended to cover the relevant third parties, who, by claiming a benefit under the contract, could also be deemed as giving back-to-back indemnities to the primary contracting parties. If the Act had made this provision, it would have expanded the contractual risk allocation regime. Given the fact that the *status quo* is maintained, and risk allocation is confined only to primary contracting parties, the Act has made no difference in this regard.

Furthermore, it is clear from the scope of this Act that the third parties it targets are those who claim entitlement to certain benefits or promises contained in the terms of commercial contracts falling within its purview,¹¹⁴⁹ and not third parties who are negatively impacted by the operations of the contracting parties. This is because nothing in the Act confers any right of action on a third party to enforce any other clause in a contract which he is not a party to; the only right of action is to enforce a promise or benefit, and even then, this is subject to the intention of the parties as detailed in the Act. The way in which third parties who are negatively impacted by the operations of the contracting parties can seek recourse has been neither strengthened nor affected in any way by the provisions of the 1999 Act.

This conclusion is slightly different when the position of non-operators is concerned. Sometimes the drilling contract recites that the operator enters into the contract for itself, and as agent of the co-venturers. This makes them disclosed principals in the contract, and this study argues that

¹¹⁴⁹ *Ibid.* Subsections 6(2) and (3) exclude contracts for carriage by sea, employment contracts, and contracts between a company and its members.

this equates to a conferment of a ‘benefit’ under the 1999 Act. Since the determination of whether a benefit has been conferred is by discerning the intention of the parties, the express recital by the parties becomes indicative of that intention. Indeed, the court in *Prudential Assurance Co Ltd v Ayres*¹¹⁵⁰ held that the requirements of section 1(1)(b) were satisfied if a term being construed had the effect of conferring a benefit on a specified third party, even if that benefit was not the predominant purpose or intent behind the term.¹¹⁵¹ Furthermore, the fact that there is a ‘benefit conferred on someone other than the third party’ does not negate the application of the subsection. In these circumstances, the presumption of intention by the parties to confer a benefit is very strong.¹¹⁵²

However, this presumption is rebutted if there is a term in the contract that expressly negates the legal rights of the third party, or is otherwise inconsistent with those rights.¹¹⁵³ This is precisely the case where the drilling contract expressly prohibits the non-operator from enforcing the contract, conferring on the operator the power in this regard, as previously discussed.¹¹⁵⁴ Where this restriction has been imposed, this study posits that the non-operators are no better than any other category of third parties contemplated by the Act.

5.4 Supply of Goods and Services Act 1982

Unless excluded by the parties to a contract, the Supply of Goods and Services Act 1982 will apply to contracts for the supply of a service. The Act defines a contract for the supply of a

¹¹⁵⁰ (2007) 3 All ER 946 per Lindsay, J.

¹¹⁵¹ But it has to be a purpose of the contract: *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* (2009) 2 Lloyd’s Rep 123.

¹¹⁵² Burrows, A. (1996) ‘Reforming Privity of Contract: Law Commission Report No. 242’, *Lloyds Maritime And Commercial Law Quarterly*, at pp. 467–486.

¹¹⁵³ *Ibid*, at p.473.

¹¹⁵⁴ In Chapter 2, under the topic: *Contracts (Rights of Third Parties) Act 1999*.

service as one in which a person agrees to undertake a service for another.¹¹⁵⁵ Although there is no definition of ‘service’ in the Act, it gives some guidance in this regard by stating that the fact that goods are transferred or agreed to be transferred pursuant to a contract of service will not negative the status of that transaction as being one for services.¹¹⁵⁶ As with other areas of law,¹¹⁵⁷ in which the true status of transactions needs to be deciphered, this study submits that the substance-over-form consideration will be required to discern the true nature of the contract. Thus, where the real substance of the contract is to carry on services, such as with a drilling contract, the fact that goods are transferred in the course of the provision of the service should not alter its original nature, thereby bringing it within the purview of the Act.

Section 13 provides that a supplier acting in the course of business is under an implied obligation to discharge his duties with reasonable care and skill. Palmer¹¹⁵⁸ suggests that this definition implies that the supplier is to perform this duty in person, and that the work will actually be carried out.¹¹⁵⁹ He further questions whether the Act will cover circumstances in which the supplier delegates his duties to another to perform on his behalf, and opines that it should, provided that delegation is not prohibited.¹¹⁶⁰

This study takes the view that section 13 is wide enough to accommodate work done through another *person*, whether this is a natural or juridical person, since there is neither a definition of ‘person’ in the Act, nor a limitation on the type of person it intended.¹¹⁶¹ Furthermore, if a person

¹¹⁵⁵ Section 12(1), Supply of Goods and Services Act 1982. By s. 12(2), contracts of service and apprenticeship contracts are exempted.

¹¹⁵⁶ Section 12(3), Supply of Goods and Services Act 1982.

¹¹⁵⁷ For example, in taxation in which the principle is used to unmask transactions that are structured purely for tax evasion or reduction purposes; see *Gregory v Helvering* 293 U.S. 465 (1935). See also *Chicago, Burlington & Quincy Railroad Co v City of Chicago*, 166 U.S. 226 (1897) in which the court held, in respect of due process, ‘regard must be had to substance, not to form’.

¹¹⁵⁸ Palmer, N. E. (1983) ‘The Supply of Goods and Services Act 1982, [Legislation]’, 46 Mod. L. Rev. 619 1983.

¹¹⁵⁹ *Ibid*, at p. 628.

¹¹⁶⁰ *Ibid*, at p. 629.

¹¹⁶¹ This position is supported by the definition of ‘Person’ contained in Schedule 1, Interpretation Act 1978 (1978 c 30).

does it through another, he does it himself in line with the principles of agency.¹¹⁶² He remains accountable for the outcome of the work, and by extension, bound by the obligation imposed by the implied term.

The Act also implies terms relating to time of performance,¹¹⁶³ as well as the compensation for the services.¹¹⁶⁴ In both cases, it makes the terms subject to the provisions of the contract, and where the contract has no relevant provisions to this effect, the implied terms of reasonableness will apply, depending on the factual circumstances of the transaction.¹¹⁶⁵ Indeed, the entire Part II of the Act is made subject to the provisions of the contract by the parties,¹¹⁶⁶ and so the parties can exclude its application. Part II is also made subject to any enactment which more particularly relates to the service which is the subject of the contract.¹¹⁶⁷

From a service contract risk allocation perspective, this Act does not do more than codify the existing position in law,¹¹⁶⁸ and making its provisions subject to the expressed intent of the parties deprives it of any real value that requires serious consideration by contract parties.

Indeed, the subject-matter of Part II is covered by most contracts, and certainly in most offshore drilling contracts. In all circumstances, the risk of discharging the service obligations¹¹⁶⁹ lies with the supplier, and the party who alleges that this standard of reasonableness has not been met in any transaction bears the onus of proving same. The recipient of the service, of course, bears the burden of paying for same.

¹¹⁶² *Qui facit per alium facit per se*. See also *Ireland v Livingstone* (1872) LR 5 HL 395.

¹¹⁶³ Section 14, Supply of Goods & Services Act 1982.

¹¹⁶⁴ *Ibid*, at s.15.

¹¹⁶⁵ *Ibid*, at ss.14(2) and 15(2).

¹¹⁶⁶ *Ibid*, at s.16(1).

¹¹⁶⁷ *Ibid*, at s.16(4).

¹¹⁶⁸ For instance, *reasonable care* is well covered in the law of tort: see *Donoghue v Stevenson* [1932] UKHL 100; and, in respect of *reasonable skill*, see, for instance the duties of company directors who are under a duty to exercise reasonable skill, care and diligence, ss. 171–177, Companies Act 2006.

¹¹⁶⁹ To exercise reasonable care and skill in the performance of his duties, and to discharge those duties in line with contractual timelines.

5.5 Other Legislation

5.5.1 *Social Action, Responsibility and Heroism (SARAH) Act 2015*

In the bedrock section, this study examined the status of voluntary and gratuitous tasks undertaken by Whiteacre for Blackacre. Notwithstanding that the tasks were voluntary, Blackacre could expect that the quality of work undertaken would be consistent with that which a professional with similar skill and qualification should produce. Therefore, even if the task was not ‘satisfactorily’ performed, Blackacre was unable to compel re-performance of the task, even though damages could be recovered if Blackacre had suffered loss because of the voluntary and gratuitous service.

However, the foregoing must be distinguished from circumstances in which the performance of the voluntary task falls within the purview of the Social Action, Responsibility and Heroism (SARAH) Act 2015,¹¹⁷⁰ which focuses on first aiders, rescuers, volunteers, and doers of good deeds aimed at saving life and property in extenuating circumstances. Given the fact that the activities of this group of people are socially beneficial, the law steps in to encourage this behaviour by requiring judges to consider the context within which the voluntary intervention was made, with a view to exculpating the volunteer from liability that may have resulted from that intervention.¹¹⁷¹ These activities are outside the scope of this study, and the underlying assumption is that the tasks that are the subject of the study are undertaken in a commercial context.

¹¹⁷⁰ Also known as the so-called ‘Good Samaritan’ law, it makes provisions in respect of matters for consideration when claims for negligence or breach of statutory duty have been brought against volunteers or doers of good deeds. It received Royal Assent on 12 February 2015, and came into force on 13 April 2015 in England and Wales.

¹¹⁷¹ For instance, in the immediate aftermath of the Macondo disaster, volunteers went to assist.

5.5.2 *Law Reform (Contributory Negligence) Act 1945*

In the bedrock section, the courts' treatment of contributory negligence was examined, highlighting the shift in their attitude towards claimants who had been contributorily negligent. Thus, the courts had sought to ameliorate the harshness of their initial stance, which exculpated Blackacre from liability once it was established that Whiteacre, the claimant, had contributed to the ensuing liability. The courts new approach was that Whiteacre's negligence had to be such that it *directly* contributed to the ensuing harm,¹¹⁷² and in *Davies v Mann*,¹¹⁷³ it laid down the 'last opportunity'¹¹⁷⁴ test, which states that when both parties have been negligent, liability should fall on the party who had the last opportunity to avoid harm from ensuing.¹¹⁷⁵

The Law Reform (Contributory Negligence) Act 1945 was enacted statutorily to empower courts to apportion the percentage of damages payable between the claimant and the defendant when a case of contributory negligence has been successfully made out. The thrust of this legislation is to ensure that a claimant is not left without a remedy in deserving cases in which the defendant's actions have caused injury recognised by law, just because the claimant also contributed to the ensuing liability.¹¹⁷⁶ The courts are enjoined to make this apportionment in a manner that was 'just and equitable', taking into consideration the claimant's own blameworthiness in the transaction.¹¹⁷⁷ The correct procedure for the courts to adopt is to work out how much would have been payable in damages if the claimant had not been contributorily negligent, and then reduce that sum in accordance with the negligent contribution.¹¹⁷⁸

¹¹⁷² *Caswell v Powell Duffryn Associated Collieries Ltd* (1940) A.C. 152 at 165.

¹¹⁷³ (1842) 152 ER 588 (Exch).

¹¹⁷⁴ Also called the 'last clear chance' or 'last clear opportunity' test.

¹¹⁷⁵ *The Boy Andrew* (1948) A.C. 140 at 148–149.

¹¹⁷⁶ Section 1, Law Reform (Contributory Negligence) Act 1945.

¹¹⁷⁷ *Ibid.*

¹¹⁷⁸ Sections 2 and 6, Law Reform (Contributory Negligence) Act 1945.

However, the manner in which the courts have made this apportionment has not been without controversy. In a recent study, Goudkamp and Nolan found that litigants had contested both the finding of contributory negligence as well as the apportionment by the courts.¹¹⁷⁹ In this regard, 44% of appeals were on the finding of contributory negligence, while 56% were on the discount. Of this number, claimants were responsible for 41% of the appeals, while the unsatisfied defendants amounted to 59% of the distribution.¹¹⁸⁰ They also found that the chances of succeeding on appeals relating to apportionment were similar for both claimants and defendants, but claimants were almost twice as likely to succeed in appeals relating to the finding of contributory negligence.

Importantly, they also found that the Court of Appeal rarely altered the quantum of apportionment upwards or downwards by small amounts, but the records show that they go as high as 50% on an average, and this is more so when they are further reducing the amount payable to the claimant as damages,¹¹⁸¹ thereby increasing the quantum of apportionment.

The immediate implication of this is that defendants have an incentive to appeal the quantum of apportionment, while claimants have an incentive to appeal the very finding of contributory negligence, seeking to obtain the full complement of damages arising from the defendant's negligence. This also means that contract parties would progressively seek to infuse greater certainty in their contracts as to the consequences of a situation in which either party has been contributorily negligent in circumstances falling outside the indemnity structure which exculpates parties even when they have been negligent.

¹¹⁷⁹ Goudkamp, J. and Nolan, D. (2017) 'Contributory negligence in the Court of Appeal: An Empirical Study', *Legal Studies*.

¹¹⁸⁰ *Ibid*, at p. 19.

¹¹⁸¹ *Ibid*, at p. 19.

Conclusion

The study has examined the regulatory framework underpinning contractual risk allocation, with the aim of understanding the current state of the risk allocation regime. To lay the proper foundation, the study undertook an examination of the bedrock of this regime, from the time in which neither contractual parties nor the legislation had made provisions for risk allocation upon the occurrence of certain risk events in the relevant areas that concern this study, and it was down to the courts to determine whether or not any liability should be imposed for loss or damage arising from the occurrence of these events. The focus was on the basis upon which they made this determination and, where appropriate, the manner in which they allocated liability for the relevant loss or damage, as well as the consequences, if any, flowing from such allocation of liability.

This study has examined the decisions that form the bedrock of the risk regulatory regime, as well as the rationale enunciated by the courts in reaching those decisions. It further discussed the underlying legal theories of liability for loss or damage that formed the basis of these decisions to provide clarity and greater understanding.

Thereafter, the ways in which contractual parties have responded to the manner in which the courts allocated liability through the use of contractual provisions (indemnities, limitation of liability, exclusion/exception provisions) were examined. These selected provisions are the primary instruments under which contractual risk is allocated in a deliberate manner.

The courts' response to risk allocation approach by contractual parties was then considered, after which the intervention of the legislature, in response to the manner in which both the courts and contractual parties have dealt with this issue, was also discussed.

As detailed above, contract parties will attempt to address the aspects of the legislative intervention that they find unfavourable in their contract provisions – for instance, in the way in which the courts have apportioned the discounts payable upon a finding of contributory negligence. There is no doubt that this is an iterative process in which all the stakeholders – contract parties, the courts, and the legislature – will constantly respond to their actions and interpretations *inter se*, as they seek to regulate the manner in which risk is allocated in contracts.

The question that now falls to be answered is whether the measures that the contract parties have taken to allocate risks themselves are effective in achieving their contract objectives – especially when juxtaposed with the bedrock positions relating to the different risk events – or whether allocating them in a different manner would produce a better result. In the context of this study, ‘effectiveness’ would be assessed by the success of the parties in allocating risk *inter se*, in a manner that stands up to judicial scrutiny, while taking into consideration the party best able to bear a given risk, which refers to the efficiency of risk allocation.

Chapter 3 discussed the position in which contract parties had not allocated specific risks, thereby giving rise to the default risk allocation mechanism by the courts. The response by the parties to re-order the default risk allocation mechanism was examined in Chapter 4, and the various methods adopted for this purpose were fully discussed. In Chapter 5, the intervention by the legislature highlighted the societal perspective on how risks should be allocated, so that commercial transactions cohere with norms, mores and public expectation. The risks and responsibilities that were allocated pursuant to the contractual response by the parties have also been discussed, with emphasis on the way in which they have been allocated *inter se*. Some rationales have been proposed to explain the way in which parties have allocated the risks, highlighting the philosophical underpinnings where applicable.

There is evidence of judicial acceptance that contract parties can utilise the risk allocation mechanisms that have already been examined – indemnities, insurance, exclusions and limitation of liability – to allocate risk contractually. Indeed, *indemnities* were specifically approved by the court in *EE Caledonia Ltd v Orbit Valve Co Europe Plc*¹¹⁸² in which it was stated that it was an industry practice that had arisen to cater for the peculiarities of the oil and gas sector, especially in respect of offshore operations. This contractual ability is founded on the principle of *freedom of contract*, which is recognised in common law and arose from equating free market economy with contract law principles, providing a platform upon which individuals could trade among themselves based on their preferred terms and conditions.¹¹⁸³ The courts acknowledge that the *freedom of contract* principle allows contract parties to utilise indemnity and exclusion clauses to release each other from liability, even for their own negligence. Based on this principle, the courts are unwilling to interfere in the way in which contract parties have allocated risks *inter se* especially when they are generally of equal bargaining power.¹¹⁸⁴

There seems to be a constant interplay, however, between the principles of *freedom of contract* and *public policy*. Even though the *freedom of contract* principle allows parties to allocate risk as they deem fit, public policy considerations will disallow the extension of this freedom in certain circumstances – for instance, relating to indemnity for own negligence,¹¹⁸⁵ or, in the USA, to indemnify a party who is liable to pay punitive damages, as this will defeat the intention of the applicable statute that was breached.¹¹⁸⁶ In the UK, it is now settled law that the risk allocation mechanisms will be respected and enforced so long as the parties express that intent. If the

¹¹⁸² (1995) 1 All ER 174.

¹¹⁸³ Atiyah, P. S. (1979) *The Rise and Fall of Freedom of Contract*. Oxford University Press, at p. 402.

¹¹⁸⁴ *Photo Productions Ltd v Securicor Transport Ltd* (1980) AC 827.

¹¹⁸⁵ Section 2(1), Unfair Contracts Terms Act 1977.

¹¹⁸⁶ Clean Water Act ('CWA'), 33 U.S.C. § 1321(b)(7). The court cited the case of *Daughdrill v Ocean Drilling & Exploration* 665 F. Supp. 477, 481-82 (E.D. La. 1987) in support of the public policy argument.

contractual provisions are clear, the courts will enforce that as being the agreed risk allocation method of the parties, and will not seek to curtail their freedom in this regard.¹¹⁸⁷

The manner of risk and responsibility allocation by contract parties has also been the subject of judicial pronouncements. The most recent validation of the ability of parties to a drilling contract to allocate risk in any manner they deem fit was given in *Transocean Drilling UK Ltd v Providence Resources Plc*.¹¹⁸⁸ In construing the way in which the parties chose to exclude *consequential losses*, the court noted that the parties had materially altered the clause to allow them to accept responsibility for losses that could have been recovered as damages for breach of contract. The court had no difficulty in giving effect to their agreement, holding that the language of the clause was clear in excluding liability for consequential losses arising from ‘spread costs’, and that the contract had been concluded between parties of equal bargaining power.¹¹⁸⁹

The court further upheld the clause as written, citing the principle of *freedom of contract*, and gave the interpretation that was consistent with the intention of the parties and that was evident in the language of the contract, to the effect that neither party should be liable to the other for *consequential losses*.¹¹⁹⁰

A central theme that seems to have emerged in the decisions of the courts relating to the principle of *freedom of contract* is their reluctance to alter the will of the parties when they are perceived

¹¹⁸⁷ See, for instance, *Persimmon Homes Ltd v Ove Arup and Partners Ltd* (2017) EWCA Civ 373.

¹¹⁸⁸ (2016) EWCA Civ 372, paras 20–24.

¹¹⁸⁹ *Ibid*, at paras 14 and 20.

¹¹⁹⁰ *Ibid*, at paras 28 and 30.

to be of ‘equal bargaining power’.¹¹⁹¹ This has been the stance of the courts when deciding on commercial contracts relating to *penalties*,¹¹⁹² *damages*¹¹⁹³ and *risk allocation*.¹¹⁹⁴

The question arises as to how the courts will approach a transaction in which the parties are clearly of unequal bargaining positions, and risk has been allocated in a way that disfavors the weaker party.

There is evidence that the courts are willing to invoke the *contra proferentem* rule, which states that ambiguities in contracts are to be construed against the maker, and in the other party’s favour in this circumstance.¹¹⁹⁵ Indeed, going by the pronouncements of the court as to their unwillingness to invoke this principle where parties are of equal bargaining power, it can be deduced that the principle would be invoked to protect the weaker party in appropriate circumstances.¹¹⁹⁶

However, there would be circumstances in which the application of the *contra proferentem* rule may not quite address the imbalance in the power equation between the parties, leaving the manner of risk allocation unusually skewed against the weaker party. In these circumstances, this study posits that the determination of cases coming within that purview should depend on what the courts deem *unconscionable*, and the subjective nature of this enquiry should widen the

¹¹⁹¹ Parties are said to have equal bargaining power if there are certain features of the transaction that leads the court to make this assessment, and these include (a) having the benefit of legal advice (b) having the opportunity to negotiate contract terms and conditions (c) dealing otherwise than on the standard terms of one entity (d) absence of coercion or duress in making the agreement. See, generally, *First Tower Trustees Ltd and another v CDS (Superstores International) Ltd* (2017) EWHC 891(Ch). See also Barnhizer, D. D. (2005) ‘Inequality of Bargaining Power’, *U. Colo. L. Rev.*, 76, pp. 139–242, at pp. 194–197, where the author examines the US jurisprudence on the subject, and makes the connection between weak bargaining positions, unreasonableness as well as one-sided clauses.

¹¹⁹² *Cavendish Square Holding BV v Talal El Makdessi* (2015) UKSC 67.

¹¹⁹³ The Transocean/BP litigation, Case 2:10-md-02179-CJB-SS Document 5446 Filed 01/26/12 at United States District Court Eastern District of Louisiana.

¹¹⁹⁴ *Transocean Drilling UK Ltd v Providence Resources Plc* (2016) EWCA Civ 372.

¹¹⁹⁵ *John Lee & Son (Grantham) Ltd v Railway Executive* (1949) 2 All ER 581.

¹¹⁹⁶ *K/S Victoria Street v House of Fraser (Stores Management) Ltd* (2011) EWCA Civ 904; (2012) Ch 497 at para. 68.

scope of discretion of the courts in reaching this determination. To do justice, the courts may choose to widen the scope of application of the rule on *unconscionability* and, before long, it may assume the status of a doctrine, such that contracts, in general, may be required to satisfy the *conscionability* test before they can be enforced.

Chapter 6

RISK ALLOCATION IN OFFSHORE DRILLING MODEL CONTRACTS

International drilling operations are mostly carried on based on contracts largely developed from models authored by regional drilling associations and aim to guide contract parties in their negotiations.¹¹⁹⁷ The model contracts are not prescriptive, and contract parties are at liberty to adapt or adopt them to conform to their contracting realities and objectives.

In the United Kingdom, Oil & Gas UK¹¹⁹⁸ has, through LOGIC, developed model contracts,¹¹⁹⁹ including the Mobile Drilling Rigs Contract, Edition 1, which target drilling operations in the United Kingdom Continental Shelf. However, the model can also be utilised outside the United Kingdom, subject to amendments that conform to the laws of the governing jurisdiction of the contract.

In the United States of America, the International Association of Drilling Contractors (IADC) has developed the international model contracts for offshore drilling campaigns, and further distinguishes between model contracts for domestic use within the USA and international use.¹²⁰⁰

In Canada, the Canadian Association of Oilwell Drilling Contractors (CAODC) and the Canadian Association of Petroleum Producers (CAPP) have developed the CAODC/CAPP Master Daywork Contract,¹²⁰¹ which applies to offshore drilling, and came into existence in May 2001, with a further update in 2004.

¹¹⁹⁷ See, generally, Martin, A. T. (2004) 'Model Contracts: A Survey of the Global Petroleum Industry', *Journal of Energy & Natural Resources Law*, 22(3), at pp. 281– 340.

¹¹⁹⁸ <http://oilandgasuk.co.uk/about-us.cfm>

¹¹⁹⁹ <https://www.logic-oil.com/content/standard-contracts-0> Standardisation of contracts is an objective initially introduced in the 1990s by the CRINE (Cost Reduction in New Era) initiative with the aim of reducing costs by 30% and helping to simplify the industry's procedures.

¹²⁰⁰ <https://iadc.ebiz.uapps.net/personifyebusiness/OnlineStore/ProductListing/tabid/56/Category/CONTRACTS/Default.aspx>

¹²⁰¹ <http://www.capp.ca/publications-and-statistics/publications/72825>.

Some operators and drilling contractors have also designed their own offshore drilling model contracts, and the extent to which these are utilised or accepted by the other contract party will depend on the balance of power between them, as well as the prevailing market/economic conditions at the time at which the work is sought to be executed.

The offshore drilling model contracts developed by these regional associations are mainly for *daywork* transactions,¹²⁰² even though model contracts for *footage*¹²⁰³ and *turnkey*¹²⁰⁴ transactions also exist. In this section, this study will focus on the key differences between the model contracts developed by the regional associations, specifically to see how they allocate different risks therein between the operator and the contractor. Given the fact that the contract parties in these model contracts are typically ‘Company’ and ‘Contractor’, reference to ‘Company’ would be deemed to include reference to the ‘operator’ in this context, and both terms would also be used interchangeably.

6.1 Daywork Contracts

The primary characteristic of daywork contracts is that the operator is in control of drilling operations, and the contractor gets a daily rate for their services. The operator directs the way in which operations are carried on, and the contractor is duty bound to comply with its instructions. The compensation structure and *command-and-control* approach of daywork

¹²⁰² A ‘day-rate’ or ‘daywork’ contract provides that the drilling contractor be paid a stipulated price (rate) for work performed at the direction of the operator over a 24-hour period with the contractor assuming only specified risks: Calkins, ‘The Drilling Contract- Legal and Practical Considerations’, 21 Rocky Mt. Min. L. Inst. 285, 288 (1975), cited by Anderson, O. L. (1989) ‘The Anatomy of an Oil and Gas Drilling Contract’, *Tulsa LJ*, 25, pp. 359–533, at p.374.

¹²⁰³ A ‘footage’ contract provides that the drilling contractor be paid a stipulated price per foot of hole drilled from the surface through the total; *ibid*, at p. 18.

¹²⁰⁴ A ‘turnkey’ contract provides for the drilling contractor to be paid a stipulated price for drilling a well to a specified depth or a targeted formation; *ibid*, at p. 20.

contracts make it inevitable that the operator bears a significant amount of risk relating to the contract.

Although the underlying philosophy of daywork contracts is the same across the different model contracts, there are some differences in the way in which some specific risks are allocated. These differences are discussed below, but where the risks have been allocated in the way already highlighted in the preceding chapter, this fact will be mentioned but no further analysis would be required.

6.1.1 *Mobile Drilling Rigs Contract, Edition 1*¹²⁰⁵

This model contract has been acknowledged by the courts as serving the oil and gas industry since 1997, and the experience garnered from utilising it has also been judicially noticed.¹²⁰⁶ This model contract has not been officially modified by its authors since it was developed, and it specifically enjoins users to seek legal advice before utilising it, as it may not be suitable for every circumstance, especially since there may have been subsequent changes in the law in force since the model contract was issued.¹²⁰⁷ It is fair to assume that users have adhered to this advice, especially since there have indeed been changes in the legislation that impact contracts in general, and including drilling contracts. For instance, the Contracts (Rights of Third Parties) Act 1999, which was discussed previously,¹²⁰⁸ has been specifically mentioned in most drilling contracts, with contract parties delineating the extent of its application therein, which, *ipso facto* defines the ability of third parties to enforce any provision in the contract, or claim a benefit therefrom.

¹²⁰⁵ See Appendix A.

¹²⁰⁶ *BP Exploration Operating Co Ltd v Dolphin Drilling Ltd* (2009) EWHC 3119 (Comm), at para. 15.

¹²⁰⁷

<file:///C:/Users/user/Dropbox/PhD%20Program/Contract%20Templates/Contract%20Templates%20from%20United%20Kingdom/Standard-Contracts-For-The-Oil-And-Gas-Industry-Mobile-Drilling-RigsEd1.pdf>

¹²⁰⁸ Under the heading ‘The Contracts (Rights of Third Parties) Act 1999’.

Nevertheless, the model contract still represents the starting point for users, especially the North Sea operators and contractors, even though there is evidence that it is also used further afield in other jurisdictions.¹²⁰⁹ The key risk allocation methods are examined below.

6.1.1.1 *Loss or Damage Caused by Subcontractors*

This model contract defines *Contractor Group* as including, *inter alia*, the contractor's subcontractors.¹²¹⁰ However, in defining *Company Group*, it omitted to list the company's other contractors or their subcontractors.¹²¹¹ The practical effect of this is seen in the section on indemnities¹²¹² in which the contract parties have provided for mutual indemnities against all losses, claims and liabilities arising from death, loss of, or damage to property of members of their respective *Groups*.¹²¹³ While the contractor indemnifies the company for the foregoing liability in respect of members of *Company Group*, which excludes the company's other contractors or their subcontractors, the company gets the full benefit of their indemnity as *Contractor Group* includes subcontractors. This means that the contractor is exposed to the operator's contractors and subcontractors, but not *vice versa*.

Article 18(2)(b) attempts to remedy this imbalance by stating that the company indemnifies the contractor for death, personal injury or disease 'to any person employed by the Company Group'. The assumption is that the term 'employ' used in this provision refers to the usual employer – employee context, rather than the context in which a resource is merely utilised, otherwise that provision would have used the term 'hire'. In this regard, the reference to 'employment' raises

¹²⁰⁹ See, for instance, Zahari, W. Z. (2017) 'A Comparative Analysis on the Enforceability of Knock-for-Knock Indemnities in Thailand and the United Kingdom', at p. 33, where the author asserts that the LOGIC model is widely used in south-east Asia, including Thailand.

¹²¹⁰ Article 1.4, Mobile Drilling Rigs Contract, Edition 1.

¹²¹¹ *Ibid*, Art. 1.2.

¹²¹² *Ibid*, Art. 18.

¹²¹³ *Ibid*, Arts 18(1) and (2).

an issue as to whether a contractor hired by the operator is an ‘employee’ or an independent contractor. This issue has been discussed previously,¹²¹⁴ and can be resolved only upon undertaking further analysis of the transaction. Such lack of clarity can jeopardise the interest of the contractor, as it would be left exposed to the operator’s contractor if the latter is held to be an independent contractor rather than an employee. In this circumstance, the independent contractor is not within the indemnity structure contemplated by Article 18, leaving the contractor with responsibility for bearing the economic consequences of any infraction that any member of *Contractor Group* commits against the independent contractor.

Furthermore, the definition of ‘third party’ for the purposes of the indemnities in the model contract as any person who belongs to neither *Contractor Group* or *Company Group*,¹²¹⁵ puts it beyond contention that the operator’s contractors, where they are found to be independent contractors, would qualify as *third parties*. This would mean that the contractor would be left exposed to the operator’s contractors where the contractor, or any member of *Contractor Group*, has been negligent, leading to the occurrence of an adverse event that causes death, injury, loss or damage to the operator’s contractors. It would have been beneficial if the operator’s contractors fell within the indemnity structure as the contractor would avoid responsibility for bearing the economic consequences of the same adverse event that creates the liability under Article 18(1)(c).

6.1.1.2 Loss of Income Arising from Inadequate Personnel

Article 8.1 requires the contractor to provide and maintain the full complement of the personnel required to undertake the drilling operations in line with the contract. Where the contractor fails

¹²¹⁴ Under the heading ‘Whiteacre Undertakes Task X for Blackacre – Through an Employee or Third Party’.

¹²¹⁵ *Op.Cit.*, Art. 18(1)(c) and (2)(c).

to do this, a grace period of 48 hours is allowed, after which the operator is entitled to deduct the applicable rates to reflect the inadequate personnel level. Furthermore, the operator also has the right to request the removal and replacement of any member of personnel who has been found to be incompetent, negligent or not safety conscious or whose presence at the worksite is inimical to the interests of the operator.¹²¹⁶ The contractor is expected to replace any personnel removed pursuant to this section within 24 hours or longer if the operator agrees to this.¹²¹⁷ Although this section is silent on the consequences of failure by the contractor to replace the personnel within the agreed period, this study posits that the operator's powers under Article 8(1) would extend to cover this situation, and the operator is able to reduce the applicable rates to reflect the reduced personnel level.

In both scenarios highlighted above, the contractor is responsible for bearing the economic consequences of the reduction in personnel. Furthermore, this is an example of how the compensation mechanism is used as a tool for risk allocation, and it further raises the question as to who bears the responsibility for the consequences of any adverse event that occurs because of the inadequate manning level. If the adverse event occurs due to the contractor's negligence, the indemnity structure in Article 18 would be triggered, and the contractor might escape culpability thereby. By the combined effects of Articles 18.2 and 18.8, if the adverse event causes any of the consequences detailed in those sections,¹²¹⁸ the indemnity structure protects the contractor from liability that would have ordinarily attached.

However, given the fact that the adverse event occurred because of inadequate manning levels, this study posits that this would be a breach of the contractor's general obligations under Article

¹²¹⁶ *Ibid.*, Art. 8.8.

¹²¹⁷ *Ibid.*

¹²¹⁸ Personal injury, death, disease, property loss or damage to any member of company group or a third party.

4, and, specifically, the breach of the obligation to exercise due care and diligence.¹²¹⁹ This is because the contractor has the obligation to ensure the adequacy and stability of the drilling operations,¹²²⁰ a key component of which is to maintain adequate personnel members, with the right skills set, knowledge and competence. In *Seadrill Management Services Ltd v OAO Gazprom*,¹²²¹ the court held that when the contractor specifically assumes an obligation in a contract, under English law, that obligation had to be discharged with reasonable care and skill, failing which the contractor might be liable in damages.

The provision of adequate and competent personnel goes to the heart of the contractor's obligations under the drilling contract, as this has a direct impact on whether the contract objectives would be achieved. Indeed, if the contractor could breach this fundamental obligation, and then escape liability *vide* the indemnity structure, this creates a perverse incentive for the contractor to breach a fundamental obligation, including not performing the contract at all, for which no remedy would be available to the operator. This position recognises that exclusion clauses in the drilling contract can exculpate the contractor from liability even in these circumstances if that intent is clearly expressed.¹²²²

But that is clearly not the case here as this model contract equates the provision of adequate and competent personnel with the provision of the drilling unit¹²²³ as far as materiality of the obligation is concerned, and the non-provision of the drilling unit has been judicially recognised as being a ground for treating the contract as terminated, entitling the operator to damages.¹²²⁴ Indeed, this is also the position of the model contract relating to the contractor's failure to deliver

¹²¹⁹ Article 4.2, Mobile Drilling Rigs Contract, Edition 1.

¹²²⁰ *Ibid*, Art. 4.3.

¹²²¹ (2011) 1 All E.R. (Comm) 1077.

¹²²² *Photo Production Ltd v Securicor Transport Ltd* (1980) A.C. 827.

¹²²³ Article 4.1, Mobile Drilling Rigs Contract, Edition 1.

¹²²⁴ *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* (2014) SGCA 16; (2014) B.L.R. 658.

the drilling unit to the well location stipulated in the contract.¹²²⁵ This model contract also stipulates that if the contractor fails to remedy the breach of any material contractual obligation for a continuing period of 10 days after notice is served, this is a basis for termination of the contract,¹²²⁶ a provision that justifies this study's position on the consequences of the occurrence of an adverse event due to the inadequacy of the rig personnel.

6.1.1.3 Risk Allocation for Various Events

The model contract allocates risk *inter se* upon the happening of certain adverse events in the manner already discussed,¹²²⁷ barring the need for further discussion. These events are:

- (a) Death of, or personal injury to, *contractor group personnel*.¹²²⁸
- (b) Death of, or personal injury to, *company group personnel*.¹²²⁹
- (c) Loss of, or damage to, contractor group's property.¹²³⁰
- (d) Loss of, or damage to, company group's property.¹²³¹
- (e) Third-party death, injury or property damage.¹²³²
- (f) Consequential losses.¹²³³
- (g) All pollution arising from surface activities and contractor equipment.¹²³⁴
- (h) All pollution *except* that arising from surface activities and contractor equipment.¹²³⁵
- (i) Wild well control.¹²³⁶

¹²²⁵ Article 22.1(f), Mobile Drilling Rigs Contract, Edition 1.

¹²²⁶ *Ibid*, Art. 22.1(e).

¹²²⁷ In Chapter 3, under the heading 'Risk Allocation between Parties to a Drilling Contract'.

¹²²⁸ Article 18.1(b), Mobile Drilling Rigs Contract, Edition 1.

¹²²⁹ *Ibid*, Art. 18.2(b).

¹²³⁰ *Ibid*, Art. 18.1(a).

¹²³¹ *Ibid*, Art. 18.2(a).

¹²³² *Ibid*, Arts 18.1(c) and 18.2(c).

¹²³³ *Ibid*, Art. 20.

¹²³⁴ *Ibid*, Art. 18.4.

¹²³⁵ *Ibid*, Art. 18.3.

¹²³⁶ *Ibid*, Art. 18.6(b).

- (j) Loss of, or damage to, well reservoir or sub-surface formation.¹²³⁷
- (k) Intellectual property and patent infringement.¹²³⁸
- (l) Insurance cover in respect of liabilities assumed under the contract by the contractor.¹²³⁹
- (m) Wreck or debris removal.¹²⁴⁰
- (n) Liability for unsound location.¹²⁴¹

For the avoidance of doubt, the model contract restates that all indemnities – except those exempted¹²⁴² – shall apply irrespective of negligence or breach of any legal duty, and gives priority to the contract over all other legal routes that could be the basis of any liability.¹²⁴³ In so doing, the model contract makes it clear that it intends to indemnify even for own negligence, thereby satisfying the judicial requirement for unequivocal expression of intent in this regard.

6.1.2 International Offshore Daywork Drilling Contract¹²⁴⁴

This model contract was developed in February 1989,¹²⁴⁵ and revised in November 2007, by the International Association of Drilling Contractors (IADC) in the USA, specifically for offshore drilling operations outside USA.¹²⁴⁶ The courts have made pronouncements on contracts that have been developed from this model, both in the USA¹²⁴⁷ and in the UK,¹²⁴⁸ especially in respect of indemnities and the ability of contract parties to use them as tools for risk allocation.

¹²³⁷ *Ibid*, Art. 18.6(c).

¹²³⁸ *Ibid*, Arts 16.5 and 16.6.

¹²³⁹ *Ibid*, Art. 19. The model contract is silent in respect of insurance by the company.

¹²⁴⁰ *Ibid*, Art. 18.7.

¹²⁴¹ *Ibid*, Art. 10, which only provides that operator is responsible for providing access to the well location, as well as the requisite survey reports.

¹²⁴² *Ibid*, Arts 18.1(c), 18.2(c), 18.5, 18.6(a) and 20.

¹²⁴³ *Ibid*, Art. 18.8.

¹²⁴⁴ See Appendix B.

¹²⁴⁵ Moomjian, C. A. ‘Drilling Contract Historical Development and Future Trends Post-Macondo: Reflections on a 35-year Industry History’, *supra*, at p. 4.

¹²⁴⁶ Information is contained on the IADC website:

<https://iadc.ebiz.uapps.net/personifyebusiness/OnlineStore/ProductDetail/tabid/55/Default.aspx?ProductId=111026>; accessed 27 January 2018.

¹²⁴⁷ *Darty v Transocean Offshore USA, Inc*, 875 So. 2d 106, 111-12 (La. App. (4th Cir.) 2004); *Rodrigue v Legros*, 563 So. 2d 248, 255 (La. 1990).

¹²⁴⁸ *Seadrill Management Services Ltd v OAO Gazprom* (2011) 1 All E.R. (Comm) 1077.

However, the model contract has not been as widely accepted and utilised internationally as its proponents had hoped, and a commentator has rationalised this as stemming from the fact that IADC developed this model contract, and others within its portfolio, without the participation of operators, and worked only with member organisations of its association. It is therefore not perceived as being reflective of the common interest or position of the industry.¹²⁴⁹ In some cases, it was firmly rejected as being one sided, in favour of the contractors, and potentially prejudicing operators.¹²⁵⁰ Recognising the shortcoming of this model contract, it has been suggested that its usefulness lies in serving both as a starting point for negotiations and as a benchmark for comparing the legal and commercial risk exposure in other model contracts sought to be utilised.¹²⁵¹

That notwithstanding, the model contract has served as the basis for developing drilling contracts used in various transactions, and continues to serve this purpose.¹²⁵² The key risk allocation methods are examined below.

6.1.2.1 Loss or Damage Caused by Subcontractors

Unlike the Mobile Drilling Rigs Contract, Edition 1, this model contract defines both ‘Contractor’s Personnel’¹²⁵³ and ‘Operator’s Personnel’¹²⁵⁴ to include their respective subcontractors regardless of tier. This prevents the situation already discussed,¹²⁵⁵ in which the

¹²⁴⁹ Martin, A. T. and Park, J. J. (2010) ‘Global Petroleum Industry Model Contracts Revisited: Higher, Faster, Stronger’, *Journal of World Energy Law & Business*, 3(1), pp. 4–43, at p. 28.

¹²⁵⁰ Pugh, W. W. (1998) ‘The IADC Offshore Drilling Contract’, *Oil and Gas Development on the Outer Continental Shelf, Paper, (Rocky Mtn Min L Fdn, 1998)* §8.

¹²⁵¹ Moomjian, C. A. ‘Drilling Contract Historical Development and Future Trends Post-Macondo: Reflections on a 35-year Industry History’, *supra*, at p. 4.

¹²⁵² Jones, P. M. (2003) ‘The Drilling Contract: A Perspective from the Hard Knocks of Litigation No. 12’, *Ann. Inst. on Min. L.*, 50, pp. 294–303, at p. 301.

¹²⁵³ Paragraph 101(d), International Offshore Daywork Drilling Contract.

¹²⁵⁴ *Ibid*, para.101(e).

¹²⁵⁵ Under the heading ‘Mobile Drilling Rigs Contract, Edition 1’.

contractor is exposed from a mutual indemnity perspective because the subcontractors of the operator are not included in the indemnity structure.

However, the concern here lies not only in the definition of the respective contractor and operator groups but with the whole indemnity section, and the impact of the anti-indemnity statutes¹²⁵⁶ that four states in the USA¹²⁵⁷ have enacted, as previously discussed.¹²⁵⁸ There is a clear and present possibility that the indemnity provisions relating to indemnification for own negligence may not be enforced for being in contravention of the statutes. This is subject, of course, to the exceptions and/or conditions to their enforcement: *inter alia*, the *fair notice* requirement,¹²⁵⁹ and its application to only certain heads of liability or losses,¹²⁶⁰ and exclusion of certain types of agreements from its scope of coverage (for example *joint operating agreements*,¹²⁶¹) and where each party provides insurance cover for the other party in equal amounts, subject to statutory limits.¹²⁶²

To circumvent the harshness of these statutes, contract parties have resorted especially to the *fair notice* requirement, which seeks to put the indemnitor on actual notice of the responsibility for bearing the economic consequences of the occurrence of certain adverse events within the exceptions permitted by the statutes. Importantly, contract parties engage in ‘forum shopping’

¹²⁵⁶ The Wyoming Act (Wyo. STAT. §§ 30-1-131 to -133 (1983); the New Mexico Act (N.M. STAT. ANN. § 56-7-2 (1986); the Louisiana Act (LA. Rnv. STAT. ANN. § 9:2780 (West Supp. 1989); the Texas Act (TEX. CIV. PRAC. & REM. CODE §§127.001–127.007).

¹²⁵⁷ Texas, Louisiana, Wyoming and New Mexico.

¹²⁵⁸ Under the heading ‘Methods of Risk Allocation’.

¹²⁵⁹ The *fair notice* principle was laid down in *Spence & Howe Constr Co v Gulf Oil Corp*, 365 S.W.2d 631, 634 (Tex. 1963), to the effect that it is only right that a party who is exposed to assuming significant risk on behalf of the other party, even in circumstances of that other party’s negligence, should be put on notice.

¹²⁶⁰ §127.003 of the Texas Act (TEX. CIV. PRAC. & REM. CODE).

¹²⁶¹ *Ibid.* §127.002 rationalises this exclusion, *inter alia*, by holding that they are not contrary to public policy. The Texas statute does not prohibit indemnity agreements for personal injury, death, or property injury resulting from radioactivity, property injury resulting from pollution, reservoir or underground damage. It also does not apply to death or property injury resulting from services to control a wild well either to protect the safety of the general public or to prevent depletion of vital natural resources (§127.004 of the Texas Act (TEX. CIV. PRAC. & REM. CODE)).

¹²⁶² Combined effects of §§127.005 and 127.006 of the Texas Act (TEX. CIV. PRAC. & REM. CODE).

for jurisdictions with more favourable treatment of indemnification for own negligence, which may sometimes lead them to choosing the laws of foreign countries, especially England and Wales,¹²⁶³ or, within the USA, the increasing preference for the *general maritime law of the United States*.¹²⁶⁴ Resort to the laws of foreign jurisdictions has its own challenges, especially in respect of interpretation of the indemnity provisions. This is examined in the following section.

6.1.2.2 Loss of, or Damage to, Own Equipment

The indemnity structure in the model contract provides for mutual indemnities between the contractor¹²⁶⁵ and operator¹²⁶⁶ for property loss or damage, with exceptions set out in the same section.¹²⁶⁷ There are other specific provisions relating to liability for damage to equipment – for instance, damage to the drilling unit arising from an unsound location, which will result in the operator’s liability for the damage as well as the payment of the *standby rate* during the repair period.¹²⁶⁸ The model contract also confirms that drilling operations would be undertaken on a daywork basis, stating that the operator will be *solely* liable for all the outcomes of the operations, including the results of the drilling operations, notwithstanding the negligence of the contractor (emphasis added).¹²⁶⁹

In *Seadrill Management Services Ltd v OAO Gazprom*,¹²⁷⁰ the drilling contract, which was based on the model contract, came before the English Court of Appeal, which had to interpret the indemnity obligation vis-à-vis the contractor’s standard of performance detailed in paragraph

¹²⁶³ As happened, for instance, in *Seadrill Management Services Ltd v OAO Gazprom* (2011) 1 All E.R. (Comm) 1077.

¹²⁶⁴ Moomjian, C. A. Jnr. (1999) ‘Contractual Insurance and Risk Allocation in the Offshore Drilling Industry’, *Drilling Contractor*, May/June, at p. 26.

¹²⁶⁵ Paragraph 901(a), International Offshore Daywork Drilling Contract.

¹²⁶⁶ *Ibid*, para. 901(c).

¹²⁶⁷ *Ibid*, para. 901(a)(1– 3), (b).

¹²⁶⁸ *Ibid*, para. 605.

¹²⁶⁹ *Ibid*, para. 501.

¹²⁷⁰ (2011) 1 All E.R. (Comm) 1077.

501. In this case, the drilling unit suffered a punch-through during ‘pre-loading’,¹²⁷¹ in consequence of which it was damaged, necessitating its removal for repairs. In resolving the dispute that arose over liability for the damage, the court, in dismissing the contractor’s appeal, found that the damage occurred due to the negligence of the master of the rig, as the seabed conditions were known before-hand, and the rig owners accepted bringing the rig in that condition. The contractor denied liability citing the indemnity provisions, and the court had to decide whether paragraph 501¹²⁷² implied an obligation that the contractor had to perform its duties under the contract with *reasonable care and skill* (emphasis added), which would call into question whether that standard had been met in the specific pre-loading circumstances.

The court held that since the parties had chosen English law as their governing jurisdiction, the contract was subject to English rules of contract interpretation and, as such, there was indeed an implied obligation of performing the contract with reasonable care and skill. The court’s rationale was that clear words were required to exclude the implied terms,¹²⁷³ and that since nothing in the contract excluded the implied terms, the contractor was in breach of contract for performing its obligations under paragraph 501 negligently, entitling the operator to damages.¹²⁷⁴

¹²⁷¹ The procedure in which the drilling unit’s legs are lowered onto the seabed to establish a firm foundation preparatory to the commencement of drilling operations.

¹²⁷² *Contractor’s Standard of Performance*

Contractor shall carry out all operations hereunder on a daywork basis. For purposes hereof the term "daywork basis" means Contractor shall furnish equipment, labor, and perform services as herein provided, for a specified sum per day under the direction and supervision of Operator inclusive of any employee, agent, consultant or subcontractor engaged by Operator to direct drilling operations). When operating on a daywork basis, Contractor shall be fully paid at the applicable rates of payment and assumes only the obligations and liabilities stated herein. Except for such obligations and liabilities specifically assumed by Contractor, Operator shall be solely responsible and assumes liability for all consequences of operations by both parties while on a daywork basis, including results and all other risks or liabilities incurred in or incident to such operations, notwithstanding any breach of representation or warranty, either expressed or implied, or the negligence or fault of any degree or character of Contractor, Contractor's Personnel, its subcontractors, consultants, agents or servants, including sole, concurrent or gross negligence, either active or passive, latent defects or unseaworthiness of any vessel or vessels, including the Drilling Unit (whether or not pre-existing), and any liability based on any theory of tort, breach of contract, breach of duty (whether statutory, contractual or otherwise), regulatory or statutory liability, or strict liability, including defect or ruin of premises, either latent or patent.

¹²⁷³ *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* (1974) AC 689.

¹²⁷⁴ *Seadrill Management Services Ltd v OAO Gazprom* (2011) 1 All E.R. (Comm) 1077, at paras 26–30.

This case serves as the authority in English law that the IADC model contract has an implied obligation that the drilling unit must be operated with reasonable care and skill, failing which the operator would be entitled to damages, notwithstanding the indemnity structure in the contract. It is also the authority on the fact that damages accruing to the operator in these circumstances are not inconsistent with the provisions of paragraph 701 that mandate payment of the applicable rate notwithstanding the negligence of the contractor. The court interpreted this paragraph as a ‘*pay now, dispute later*’ clause, meaning that the operator could recover damages where it had already paid the applicable rate but the service had not been rendered, meaning that the rate paid was ‘wasted’.¹²⁷⁵

The *Seadrill* decision highlights the fact that some of the provisions of the model contracts are potentially conflicting, and could jeopardise the manner of risk allocation intended by the contract parties. This is especially so when the conflict is with a provision in the liability section of the contract. There could be conflicts between the contractor’s general obligations and the liability section, as was seen in this case. The interpretation of the English Court of Appeal implied a duty of reasonable care into the obligation section, which defeated the intended risk undertaking evidenced in the liability section. For instance, while the contractor has the obligation to take all steps necessary, and to act reasonably, to prevent a wild well situation from ensuing, all the model contracts allocate the risk of a wild well to the operator. This inevitably leads to a situation in which, as in *Seadrill*, the contractor needs to demonstrate *reasonableness*, as no definition has been given to this term by the contract parties. This process can potentially become acrimonious, and lead to a *Seadrill* outcome in which the obligation section takes precedence over the liability section.

¹²⁷⁵ *Ibid*, at para. 30. See also Ogilvie, J. and Doe, J. (2009) *The IAD Drilling Contract: SeaDrill v OAO Gazprom*. London: Herbert Smith LLP. Available at: <https://www.lexology.com/library/detail.aspx?g=181f42c1-4755-465d-af61-7dd9ac94f51c>; accessed: 28 January 2018.

This study recommends that contract parties should insert a clear provision to the effect that either one of the sections will prevail in case of an ambiguity or conflict. This would certainly have changed the outcome in *Seadrill*, and puts beyond contention what the parties intended as far as that specific situation is concerned.

6.1.2.3 Loss of, or Damage to, Contractor Equipment (Including Drilling Unit)

The model contract allocates the responsibility of bearing the economic consequences of damage to all subsea equipment to the operator.¹²⁷⁶ Typically, other model contracts provide that the operator would be responsible for subsea equipment if it gets damaged during in-hole operations, provided that the contractor was not negligent.¹²⁷⁷ This model contract contains a similar provision,¹²⁷⁸ but it does not curtail the operator's responsibility to bear the economic consequences of any damage that occurs through the negligence of the contractor. However, it makes the operator's responsibility to bear the economic consequences of any in-hole equipment damaged during in-hole operations subject to the extent of insurance available to the contractor from their insurers.¹²⁷⁹ Thus, the operator's responsibility to bear the economic consequences will be triggered only by a shortfall in the contractor's insurance.

Perhaps of more importance to this study are the provisions of the model contract that allocate to the operator the responsibility for bearing the economic consequences of loss of, or damage to 'Contractor's Items' arising from vessels, tugs or helicopters provided by the operator.¹²⁸⁰ Under the definition of 'Contractor's Items', the drilling unit is listed among other equipment.¹²⁸¹ The implication of this provision is that the operator also has a residual liability to pay for the

¹²⁷⁶ Paragraph 901(a)(2), International Offshore Daywork Drilling Contract.

¹²⁷⁷ See, for instance, Art. 18.5, Mobile Drilling Rigs Contract, Edition 1.

¹²⁷⁸ Paragraph 901(a)(1), International Offshore Daywork Drilling Contract.

¹²⁷⁹ *Ibid*, para. 901(a).

¹²⁸⁰ *Ibid*, para. 901(a)(4).

¹²⁸¹ *Ibid*, para. 101(c).

cost of replacing the drilling unit if it is damaged or destroyed by the actions of a subcontractor that is ordinarily covered under the indemnity structure.¹²⁸² This is a significant exposure for the operator, especially in the event of the total loss of the drilling unit. Drawing from the *Deepwater Horizon* experience, in which a lot of money was paid in compensation for the lost rig, the operator needs to insure specifically against that eventuality which BP did not have to do, as it was not under the same burden of risk allocation.¹²⁸³

Furthermore, the same provision of the model contract makes it clear that the operator would be responsible for bearing the economic consequences of any damage to the drilling unit caused by a supply vessel hired by the operator. Although the vessel owner is a subcontractor and, thus, part of the indemnity structure in the model contract, the operator has no protection here like that previously set out in the Mobile Drilling Rigs Contract, Edition 1.¹²⁸⁴

6.1.2.4 Third-Party Death, Injury or Property Damage

In this section, ‘third party’ refers to the class of people who are negatively impacted by the operations of contracting parties, which cause death, injury or other damage to them, their property or their relatives (in case of death). The model contract does not make provision for third-party death, injury or property damage. Accordingly, it leaves it to contract parties to determine the risk allocation mechanism that they wish to adopt in specific instances. In this regard, different options are open to contract parties.

¹²⁸² *Ibid*, para. 101(e) lists the operator’s subcontractors of any tier as being members of *Operator Personnel*.

¹²⁸³ Green, M. (2010) *Transocean: Insurers Have Already Paid \$401 Million for Deepwater Horizon Loss*. USA: InsuranceNewsNet. Available at: <https://insurancenewsnet.com/oarticle/Transocean-Insurers-Have-Already-Paid-401-Million-for-Deepwater-Horizon-Loss-a-188498#.Wfp6CGaDPIU>; accessed: 2 November 2017.

¹²⁸⁴ Under the heading ‘Loss of, or Damage to, Own Equipment including the Drilling Rig’.

For instance, the contract can provide that the contractor shall indemnify the operator for third-party claims arising either from its own negligence, and *vice versa*¹²⁸⁵ or, more generally, during the performance of the contract. Contract parties can also agree that the designated applicable law shall determine their respective third-party liabilities.¹²⁸⁶ The implication of tying liability in this context to negligence is the requirement for an investigation into the conduct of both parties before a finding can be made. This process can be adversarial, time consuming and resource draining for both parties. In this regard, contract parties have been advised to mitigate the potential claims arising from third parties by ensuring that subcontractors are captured within the indemnity structure of the contract, leaving only a small class of people who would come under the ‘true third-party’ purview.¹²⁸⁷

6.1.2.5 Risk Allocation for Various Events

The IADC model contract allocates risk to the parties *inter se* upon the happening of certain adverse events in the manner already discussed,¹²⁸⁸ barring the need for further discussion. These events are:

- (a) Death of, or personal injury to *Contractor’s Personnel*.¹²⁸⁹
- (b) Death of, or personal injury to *Operator’s Personnel*.¹²⁹⁰
- (c) Loss of, or damage to, operator’s property.¹²⁹¹
- (d) Loss of, or damage to, contractor’s surface equipment.¹²⁹²

¹²⁸⁵ See, for instance, Arts 18.1(c) and 18.2(c), Mobile Drilling Rigs Contract, Edition 1.

¹²⁸⁶ Foster, S. J., Gibbie, K. W., Mason, D. C. and Baron, S. L. ‘Risks Assumed in Drilling Contracts: Global Comparison and Case Histories’. *SPE/IADC Drilling Conference: Society of Petroleum Engineers*, at p. 5.

¹²⁸⁷ Moomjian, C. A. (1999) ‘Contractual Insurance and Risk Allocation in the Offshore Drilling Industry’, *Drilling Contractor*, March/April at p. 16.

¹²⁸⁸ In Chapter 3, under the heading ‘Risk Allocation between Parties to a Drilling Contract’.

¹²⁸⁹ Paragraph 903, International Offshore Daywork Drilling Contract.

¹²⁹⁰ *Ibid*, para. 904.

¹²⁹¹ *Ibid*, para. 901(c).

¹²⁹² *Ibid*, Appendix D, para 83(a).

- (e) Loss of, or damage to, contractor's downhole equipment.¹²⁹³
- (f) Consequential losses.¹²⁹⁴
- (g) All pollution arising from surface activities and contractor equipment.¹²⁹⁵
- (h) All pollution *except* that arising from surface activities and contractor equipment.¹²⁹⁶
- (i) Wild well control.¹²⁹⁷
- (j) Loss of, or damage to, well reservoir or sub-surface formation.¹²⁹⁸
- (k) Intellectual property and patent infringement.¹²⁹⁹
- (l) Insurance cover in respect of liabilities assumed under the contract by the contractor and operator.¹³⁰⁰
- (m) Wreck or debris removal.¹³⁰¹
- (n) Liability for unsound location.¹³⁰²

The model contract restates that all indemnities shall apply irrespective of negligence or breach of any legal duty, and gives priority to the contract over all other legal routes that could be the basis of any liability.¹³⁰³ Although the model contract makes it clear that it intends to indemnify even for own negligence, the enforcement and extent thereof remain subject to the application of the anti-indemnity statutes discussed earlier in this section.¹³⁰⁴

¹²⁹³ *Ibid*, para. 901(a)(1).

¹²⁹⁴ *Ibid*, para. 909.

¹²⁹⁵ *Ibid*, para. 905(a).

¹²⁹⁶ *Ibid*, para. 905(b).

¹²⁹⁷ *Ibid*, para. 906.

¹²⁹⁸ *Ibid*, paras 902 and 907.

¹²⁹⁹ *Ibid*, para. 908.

¹³⁰⁰ *Ibid*, para. 1001. The provision also confirms that the operator shall waive the right of subrogation against the contractor only to the extent of liabilities that the operator assumes. The operator is mandated to maintain insurance in the same way that the contractor does, unlike the Mobile Drilling Rigs Contract, Edition 1 which mandates only contractor insurance.

¹³⁰¹ *Ibid*, para 906.

¹³⁰² *Ibid*, para 605.

¹³⁰³ *Ibid*, paras 911 and 912.

¹³⁰⁴ Under the heading 'Loss or Damage Caused by Subcontractors'.

6.1.3 CAODC/CAPP Master Daywork Contract¹³⁰⁵

This model contract is cited as another example of the product of collaboration between operators and contractors, like the Mobile Drilling Rigs Contract, Edition 1, which was collaboratively developed by operators and contractors in the UK under the aegis of CRINE.¹³⁰⁶ The CAODC/CAPP Master Daywork Contract was developed in 2001 by the Canadian Association of Oilwell Drilling Contractors (CAODC) and the Canadian Association of Petroleum Producers (CAPP), and has been accepted by both the oil and gas industry in Canada and the judiciary. In a recent decision, the Alberta Court of Queen's Bench in *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*¹³⁰⁷ upheld the indemnity structure in the contract, which was based on this model contract, affirming the contract parties' right to allocate risk in the way that they did, given their freedom of contract. In upholding the knock-for-knock provisions, the court, recognising that the model contract was accepted industry wide, further stated that enforcing these provisions was neither contrary to public policy nor unconscionable, as both parties were sophisticated and had equal bargaining power.¹³⁰⁸

Although the knock-for-knock provisions, as incorporated in the model contract, have been acknowledged as representing a change in the attitude of the Canadian oil and gas industry to the regime, it has been stated that their use is still not as pervasive as it is in the UK.¹³⁰⁹ Nevertheless, the model contract represents the most acceptable starting point in drilling negotiations in Canada, and the key risk allocation methods are examined below.

¹³⁰⁵ See Appendix C.

¹³⁰⁶ Martin, A. T. (2004) 'Model Contracts: A Survey of the Global Petroleum Industry', *Journal of Energy & Natural Resources Law*, 22(3), pp. 281–340, at p. 295.

¹³⁰⁷ (2016) ABQB 365.

¹³⁰⁸ *Ibid*, at para. 56.

¹³⁰⁹ Mercier, T., Kane, J. and Nammour, S. (2014) 'Drafting Canadian Oilfield Master Service Agreements: An Overview of Key Clauses and Market Trends', *Alta. L. Rev.*, 52, pp. 245–284, at p. 255.

6.1.3.1 Loss or Damage Caused by Subcontractors

Just like the Mobile Drilling Rigs Contract, Edition 1, this model contract defines *Contractor's Group* as including, *inter alia*, the contractor's subcontractors,¹³¹⁰ and omits to do the same in defining *Operator's Group*.¹³¹¹ The practical effect of this has been discussed previously¹³¹² as it impacts on the section on allocation of risk and liability,¹³¹³ especially relating to the mutual indemnities against all losses, claims and liabilities arising from death, loss of, or damage to property of members of their respective groups.¹³¹⁴ While the operator gets the full benefit of their indemnity: as the *Contractor's Group* includes subcontractors, the contractor is exposed to the operator's contractors and subcontractors, as they are not part of the indemnity structure. Although Article 10.7 attempts to remedy this imbalance by stating that the company indemnifies the contractor for death, personal injury or disease *to the employees of Operator's Group*, this brings its own challenges, which have been discussed previously.¹³¹⁵

6.1.3.2 Risk Allocation for Various Events

The model contract allocates risk to the parties *inter se* upon the happening of certain adverse events in the manner already discussed,¹³¹⁶ barring the need for further discussion. These events are:

- (a) Death of, or personal injury to, employees of *Contractor's Group*.¹³¹⁷
- (b) Death of, or personal injury to, employees of *Operator's Group*.¹³¹⁸

¹³¹⁰ Article 1.1, CAODC/CAPP Master Daywork Contract.

¹³¹¹ *Ibid*, Art. 1.1.

¹³¹² Under the heading 'Mobile Drilling Rigs Contract, Edition 1'.

¹³¹³ Article 10, CAODC/CAPP Master Daywork Contract.

¹³¹⁴ *Ibid*, Arts 10.6 and 10.7.

¹³¹⁵ Under the heading 'Mobile Drilling Rigs Contract, Edition 1'.

¹³¹⁶ In Chapter 3, under the heading 'Risk Allocation Between Parties to a Drilling Contract'.

¹³¹⁷ Article 10.6, CAODC/CAPP Master Daywork Contract.

¹³¹⁸ *Ibid*, Art. 10.7.

- (c) Loss of, or damage to, *Contractor's Surface Equipment*.¹³¹⁹
- (d) Loss of, or damage to, *Contractor's Downhole Equipment*.¹³²⁰
- (e) Loss of, or damage to, *Operator Equipment*.¹³²¹
- (f) Third-party death, injury or property damage.¹³²²
- (g) Consequential losses.¹³²³
- (h) All pollution arising from surface activities and contractor equipment.¹³²⁴
- (i) All pollution *except* that arising from surface activities and contractor equipment.¹³²⁵
- (j) Environmental loss or damage to *Contractor's Items*.¹³²⁶
- (k) Wild well control.¹³²⁷
- (l) Loss of, or damage to well reservoir or sub-surface formation.¹³²⁸
- (m) Intellectual property and patent infringement.¹³²⁹
- (n) Insurance cover in respect of liabilities assumed under the contract by the contractor and operator.¹³³⁰
- (o) Liability for unsound location.¹³³¹

For the avoidance of doubt, the model contract restates that all indemnities shall apply irrespective of negligence or breach of any legal duty, and gives priority to the contract over all other legal routes that could be the basis of any liability.¹³³² By this provision, the model contract

¹³¹⁹ *Ibid*, Art. 10.1.

¹³²⁰ *Ibid*, Art. 10.3(a)(i).

¹³²¹ *Ibid*, Art. 10.3(a)(ii).

¹³²² *Ibid*, Arts 10.10 and 10.11.

¹³²³ *Ibid*, Art. 10.14.

¹³²⁴ *Ibid*, Art. 10.8.

¹³²⁵ *Ibid*, Art. 10.9.

¹³²⁶ *Ibid*, Art. 10.2(b).

¹³²⁷ *Ibid*, Art. 10.3(c).

¹³²⁸ *Ibid*, Art. 10.3(a)(iii).

¹³²⁹ *Ibid*, Art. 15.1.

¹³³⁰ *Ibid*, Art. 11. The operator is mandated to maintain insurance in the same way that the contractor does, and both parties are required to specify the other party as additional insureds in their respective insurance policies. The provision also confirms that the operator shall waive the right of subrogation against the contractor only to the extent of liabilities that the operator assumes.

¹³³¹ *Ibid*, Art. 10.5.

¹³³² *Ibid*, Arts 10.13(a) and (b).

expresses the intent to indemnify even for own negligence, thereby satisfying the judicial requirement for unequivocal expression of intent in this regard.

6.1.4 Contract Model of a Major Operator¹³³³

In this section, the model contract of an international oil and gas exploration and production company that had extensive interests in West Africa – for reasons of confidentiality, referred to as ‘ExplorCo’ – is discussed. The drilling contractor is a major global player in the drilling services sector, and will be referred to here as ‘DrillCo’. Given the private nature of negotiations between contract parties, it is difficult to speculate as to which factors determined the risk allocation methods adopted. However, suffice it to say that in 2013, when the contract was made, significant discoveries had been made in East Africa, which increased the demand for rigs in Africa as a whole.¹³³⁴ In this regard, the market conditions would typically have been in favour of the drilling contractors, and they would ordinarily have been able to influence which provisions were ultimately utilised in the drilling contract. However, ExplorCo’s leverage over DrillCo cannot be underestimated, as this operator had multiple wells planned in the drilling programme, so the potential for continuous future work would have been a factor to consider in the overall balance of power dynamics between the parties.

This contract was successfully utilised to prosecute the drilling campaign, without any need to recourse to the courts for the settlement of any dispute. This can be interpreted as meaning that the risk allocation methods were acceptable in this instance to both parties. The key risk allocation methods are examined below.

¹³³³ See Appendix D.

¹³³⁴ Liou, J. (2012) *Positive Rig Demand Steers 2013 Outlook*. Drilling Contractor. Houston: International Association of Drilling Contractors. Available at: <http://www.drillingcontractor.org/2012/novemberdecember-2012>; accessed 30 January 2018.

6.1.4.1 Liability for Punitive and Exemplary Damages

This model contract allows contract parties to indemnify each other for liabilities or damages of any kind, including punitive and exemplary damages.¹³³⁵ It also allows indemnification for fines, charges and penalties of any kind imposed by a competent authority.¹³³⁶ These indemnities apply irrespective of cause, fault or negligence, and would be effective even if there has been failure to comply with any applicable law or breach of statutory duty.¹³³⁷ This risk allocation method is novel in that it specifically provides for indemnification for punitive and exemplary damages in the same circumstances that the US courts have stated that this would not be allowed, on the ground of public policy.

The governing law of this model contract is English law, which, as previously discussed,¹³³⁸ will permit indemnification for punitive damages provided that this intent is clearly expressed by the parties. This is, perhaps, why the contract parties stipulated for indemnification in these circumstances, regard having been had to the judicial attitude of the courts of England.

6.1.4.2 Priority of Insurance for Indemnification

Unlike the IADC model contract, which provides for the operator's residual liability in respect of damage or loss of *Contractor's* Items, including the drilling unit, if they are damaged or destroyed by the actions of a subcontractor,¹³³⁹ the ExplorCo model contract indemnifies the operator, ExplorCo, from liability in this regard.¹³⁴⁰ Furthermore, both parties agree that DrillCo's insurance shall have priority over any insurance maintained by ExplorCo, even if there

¹³³⁵ Clause 13.1(a)(i), ExplorCo Model Contract.

¹³³⁶ *Ibid*, Cl. 13.1(a)(ii).

¹³³⁷ *Ibid*, Cl. 13.1(b).

¹³³⁸ Under the heading 'Requirement to "indemnify, defend, release and hold harmless"'. See also *Persimmon Homes Ltd v Ove Arup and Partners Ltd* (2017) EWCA Civ 373.

¹³³⁹ Paragraph 901(a)(2), International Offshore Daywork Drilling Contract.

¹³⁴⁰ Clause 15.1, ExplorCo Model Contract.

is an overlap in terms of the subject-matter covered.¹³⁴¹ However, this is only in respect of DrillCo's liabilities, indemnities and obligations under the contract.¹³⁴²

These provisions reinforce the intent of the parties that the contractor be solely responsible for bearing the economic consequences of the occurrence of any of the events for which they have accepted liability. Aside from holding ExplorCo harmless in respect of all excesses and deductibles incorporated in the insurance policies, DrillCo is also required to name ExplorCo as an additional assured to the extent of the liabilities and indemnities assumed by DrillCo under Clauses 13¹³⁴³ and 14¹³⁴⁴ of the model contract, except for employer's liability insurance.¹³⁴⁵

6.1.4.3 Indemnification for Gross Negligence

The model contract indemnifies contract parties even for *gross negligence*.¹³⁴⁶ Given that this contract is governed by English law and, as previously discussed,¹³⁴⁷ the current state of the law is that the distinction between negligence and *gross negligence* is 'sterile and semantic',¹³⁴⁸ it is doubtful that this clause will be enforced before an English court.

This is certainly an area of UK jurisprudence that is evolving and, if the attitude of the court in *Camarata Property v Credit Suisse Securities*¹³⁴⁹ is to be followed, the time may come when the UK courts recognise the distinction and enforce the indemnity accordingly. Thus, clarity is required in this area of English jurisprudence. Contract parties must understand the implication of terms for which they provide in their contracts, and certainty and consistency of approach,

¹³⁴¹ *Ibid*, Cl. 15.6.

¹³⁴² *Ibid*, Cl. 13 and 14.

¹³⁴³ Provisions on liabilities and indemnities.

¹³⁴⁴ Provides for consequential losses.

¹³⁴⁵ Clause 15.1, ExplorCo Model Contract.

¹³⁴⁶ *Ibid*, Cl. 13.1(b)(i).

¹³⁴⁷ Under the heading 'Negligence/Wilful Misconduct in Risk Allocation'.

¹³⁴⁸ Per Lord Justice Aikens in *Springwell v JP Morgan* [2010] EWCA Civ 1221 at para 193.

¹³⁴⁹ (2011) EWHC 479.

which are a hallmark of the English judicial doctrines of precedents and *stare decisis*, must apply to this area of the law. Essentially, contract parties must understand whether inclusion of the indemnification for gross negligence would ordinarily be enforced by an English court, or the courts would treat it as a cosmetic addition that means nothing within English jurisprudence.

6.1.4.4 Risk Allocation for Various Events

The model contract allocates risk to the parties *inter se* upon the happening of certain adverse events in the manner already discussed,¹³⁵⁰ barring the need for further discussion. These events are:

- (a) Death of, or personal injury to, *Contractor Group Personnel*.¹³⁵¹
- (b) Death of, or personal injury to, *Operator Group Personnel*.¹³⁵²
- (c) Loss of, or damage to, *Contractor's Surface Equipment*.¹³⁵³
- (d) Loss of, or damage to, *Contractor's Downhole Equipment*.¹³⁵⁴
- (e) Loss of, or damage to, *Company Group's Equipment*.¹³⁵⁵
- (f) Loss of, or damage to, *Contractor's Items and Property*.¹³⁵⁶
- (g) Third-party death, injury or property damage.¹³⁵⁷
- (h) Loss or damage caused by subcontractors.¹³⁵⁸
- (i) Consequential losses.¹³⁵⁹
- (j) All pollution arising from surface activities and contractor equipment.¹³⁶⁰

¹³⁵⁰ In Chapter 3, under the heading 'Risk Allocation between Parties to a Drilling Contract'.

¹³⁵¹ Clause 13.2(b), ExplorCo Model Contract.

¹³⁵² *Ibid*, Cl. 13.2(a).

¹³⁵³ *Ibid*, Cl. 13.3(b).

¹³⁵⁴ *Ibid*, Cl. 13.4.

¹³⁵⁵ *Ibid*, Cl. 13.3(a).

¹³⁵⁶ *Ibid*, Cl. 13.3(b).

¹³⁵⁷ *Ibid*, Cl. 13.8.

¹³⁵⁸ *Ibid*, Cl. 1.1 includes subcontractors in the definition of *Company Group*.

¹³⁵⁹ *Ibid*, Cl. 14.

¹³⁶⁰ *Ibid*, Cl. 13.7.

- (k) All pollution *except* that arising from surface activities and contractor equipment.¹³⁶¹
- (l) Environmental loss or damage to *Contractor's Items*.¹³⁶²
- (m) Wild well control.¹³⁶³
- (n) Loss of, or damage to, well reservoir or sub-surface formation.¹³⁶⁴
- (o) Intellectual property and patent infringement.¹³⁶⁵
- (p) Insurance cover in respect of liabilities assumed under the contract by the contractor and operator.¹³⁶⁶
- (q) Liability for non-workmanlike performance.¹³⁶⁷
- (r) Wreck or debris removal.¹³⁶⁸
- (s) Liability for Unsound Location.¹³⁶⁹

For the avoidance of doubt, the model contract restates that all indemnities shall apply irrespective of negligence or breach of any legal duty, and gives priority to the contract over all other legal routes that could be the basis of any liability.¹³⁷⁰ By this provision, the model contract confirms the intent to indemnify even for own negligence and, in this regard, satisfies the judicial requirement for clear expression of this intent.

6.2 Turnkey Contracts

The most pre-dominant type of model contract utilised for offshore drilling is the *daywork* contract.¹³⁷¹ However, *turnkey contracts* are sometimes used if both contract parties agree a specified depth or reservoir formation that the contractor is required to drill, and for which a

¹³⁶¹ *Ibid*, Cl. 13.6.

¹³⁶² *Ibid*, Cl. 13.6(v).

¹³⁶³ *Ibid*, Cl. 13.6(iii).

¹³⁶⁴ *Ibid*, Cl. 13.6(i).

¹³⁶⁵ *Ibid*, Cl. 18.5 and 18.6.

¹³⁶⁶ *Ibid*, Cl. 15. The model contract is silent in respect of insurance by the operator.

¹³⁶⁷ *Ibid*, Cl. 8.1.

¹³⁶⁸ *Ibid*, Cl. 8.9.

¹³⁶⁹ *Ibid*, Cl. 9.3.

¹³⁷⁰ *Ibid*, Cl. 13.1(a) and (b).

¹³⁷¹ Anderson, O. L. (1989), 'The Anatomy of an Oil and Gas Drilling Contract', *supra*, at p. 376.

specified amount would be paid. Among the organisations that have authored the model contracts that are the focus of this study, only the IADC has developed a turnkey model contract,¹³⁷² which is designed for offshore work within the USA. There is no evidence that this model contract has been used outside the USA, or been the subject of litigation in any other country. Indeed, a commentator has stated that turnkey contracts are used only in the Gulf of Mexico, and for not more than 15% of the total contracts in that sector, and mostly for exploratory drilling.¹³⁷³ He attributes this low utilisation to the fact that turnkey contracts focus on only one performance indicator – *metres drilled per day* – at the expense of other important indicators, which can lead to a perverse incentive to distort information.¹³⁷⁴ It may also be due to the manner in which petroleum authorisations work outside the USA, in which state involvement is more intrusive. The state may want to have more control and involvement in the drilling process, and the turnkey structure prevents this.

Unlike in daywork contracts, in which the operator is in control of drilling operations, the contractor in a turnkey contract typically assumes control of drilling operations and, *ipso facto*, takes on greater responsibility of bearing the economic consequences of the occurrence of adverse events while performing the contract. In *Total Drilling Co v Abraham*,¹³⁷⁵ the court stated that the drilling contractor, having accepted the specifically agreed lump-sum consideration for the project, would be responsible for any cost escalation, whether arising from weather or a wild well. However, there are risks that are allocated to the operator, who retains

¹³⁷² In February 1988.

¹³⁷³ Osmundsen, P., Sorenes, T. and Toft, A. (2009) 'Oil Service Contracts: New Incentive Schemes to Promote Drilling Efficiency', *supra*, at p. 223, citing Corks, K. (2000) 'Turnkey Contracts as a Response to Incentive Problems: Evidence from the Offshore Drilling Industry', *Unpublished Working Paper, Harvard University*.

¹³⁷⁴ *Ibid*, at p. 223.

¹³⁷⁵ 64 N.M. 380, 328 P.2d 1083 (1958).

the obligation to pay the contractor¹³⁷⁶ even if the drilling operations result in a *dry hole*.¹³⁷⁷ The key risk allocation methods are discussed below.

The underlying meaning and implication of the respective obligations on the contract parties are typically the same in turnkey contracts as they are in daywork contracts; the difference is that there is a swap of who bears the responsibility for the economic consequences of the occurrence of the adverse events in turnkey contracts. However, there are some differences in the way in which some specific risks are allocated. These differences are discussed below, but where the risks have been allocated in the way already highlighted in the preceding chapter and sections, this fact will be mentioned but no further analysis would be required.

6.2.1 Offshore Turnkey Drilling Contract – US

This model contract has not been officially modified by its authors since it was developed in 1988, and specifically enjoins users to seek the advice of counsel before utilising it, as it may not be suitable for every circumstance. This admonition is well placed as this model contract has been used only in limited circumstances – for instance, for well interventions, and by contractors that are both willing and able to bear the responsibility of the economic consequences of the occurrence of adverse events that an operator would ordinarily be sufficiently experienced to bear.¹³⁷⁸

It is important to highlight that the model contract anticipates that there may be circumstances in which drilling operations would be conducted on a daywork basis – for instance, if the operator elects to take over operations to control a wild well. In these circumstances, the model contract

¹³⁷⁶ *Tilley v Allied Materials Corp*, 208 Okla. 433, 256 P.2d 1110 (1953).

¹³⁷⁷ A well that contains hydrocarbons that cannot be produced in economic quantities, making it unprofitable to progress to the production stage. The consequence of encountering a dry hole is to abandon the well.

¹³⁷⁸ Osmundsen, P., Sorenes, T. and Toft, A. (2009) 'Oil Service Contracts: New Incentive Schemes to Promote Drilling Efficiency', *supra*, at p. 227.

makes separate provisions for risk allocation that reflect previous discussions on the subject-matter covered.

Despite the limitations of the model contract, it is useful in circumstances in which the operator is a small player in the industry with no prior experience, and so is willing to delegate control to the contractor. The key risk allocation methods are examined below.

6.2.1.1 Liability for Non-Workmanlike Performance

As previously discussed,¹³⁷⁹ the contractor is ordinarily supposed to conduct the drilling operations in ‘a good, diligent, safe and workmanlike manner’. However, the model contract specifically excludes the application of this standard in undertaking drilling operations by either party.¹³⁸⁰ Ordinarily, this objective standard holds contractors accountable for professional wrongdoing if they demonstrate capacity that falls below that ordinarily expected of a practitioner within their trade. Excluding its application means that the contractor cannot be held liable for any wrong that ensues from the failure to undertake the given task to the expected standard.

Given that this model contract also anticipates circumstances in which the operator takes over control of the drilling operations, the exclusion also applies to the operator. This raises the question as to how an English court would interpret this clause if it came before it for consideration. This is against the backdrop of the decision in *Seadrill Management Services Ltd v OAO Gazprom*,¹³⁸¹ in which the court held that the duty to take reasonable care was implied in the performance of the obligations under the drilling contract. However, the court’s rationale

¹³⁷⁹ Under the heading ‘Conduct of Drilling Operations’.

¹³⁸⁰ Paragraph 501, Offshore Turnkey Drilling Contract – US.

¹³⁸¹ (2011) 1 All E.R. (Comm) 1077.

was that there was nothing in the contract that showed a contrary intention.¹³⁸² It follows that if the contract parties specifically exclude this, just as in the model contract, the courts will respect this risk allocation, and enforce it accordingly.

When the implied term has been expressly excluded, as is the case here, this creates a perverse incentive for the contractor to undertake their obligation without reasonable care, especially in respect of tasks whose liability is borne by the operator.

In the light of this possibility, this study recommends that the contract parties make a specific provision for the duty of good faith to apply in the performance of the obligations in respect of which the implied term of reasonableness has been excluded. In English jurisprudence, there is no overarching doctrine of good faith as the courts have always been wary that it could open the floodgates for defeating agreements freely entered upon by contract parties.¹³⁸³ However, English law recognises the ability of contract parties to provide for this expressly, and the courts will enforce it if the scope and extent of the obligation to act in good faith are clear.¹³⁸⁴ In this regard, it is up to the parties to make this provision, taking care to ensure that it is clear in both its intent and the extent of its application.

6.2.1.2 Risk Allocation for Various Events – Irrespective of Turnkey or Daywork Basis

There are risk allocation methods in the model contract that remain the same irrespective of whether drilling operations are being conducted on a turnkey or daywork basis. This allocation of risk to the parties *inter se* upon the happening of certain adverse events has already been discussed,¹³⁸⁵ barring the need for further discussion. These events are:

¹³⁸² *Ibid*, at paras. 27–28.

¹³⁸³ *MSC Mediterranean Shipping Co S.A. v Cottonex Anstalt* (2016) EWCA Civ 789.

¹³⁸⁴ *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* (2013) EWCA Civ 200.

¹³⁸⁵ In Chapter 3, under the heading ‘Risk Allocation between Parties to a Drilling Contract’, and in the preceding sections in this chapter.

- (a) Death of, or personal injury to, *Contractor's Personnel*.¹³⁸⁶
- (b) Death of, or personal injury to, *Operator's Personnel*.¹³⁸⁷
- (c) Loss of, or damage to, *Contractor's Surface Equipment*.¹³⁸⁸
- (d) Loss of, or damage to, *Operator's Items and Property*.¹³⁸⁹
- (e) Third-party death, injury or property damage.¹³⁹⁰
- (f) Consequential losses.¹³⁹¹
- (g) Loss or damage caused by subcontractors.¹³⁹²
- (h) Loss of, or damage to, well reservoir or sub-surface formation.¹³⁹³
- (i) All pollution arising from surface activities and contractor equipment.¹³⁹⁴
- (j) Intellectual property and patent infringement.¹³⁹⁵
- (k) Insurance cover in respect of liabilities assumed under the contract by the contractor and operator.¹³⁹⁶

6.2.1.3 Risk Allocation for Various Events – Turnkey Basis

The model contract allocates risk to the parties *inter se* upon the happening of certain adverse events in the manner already discussed,¹³⁹⁷ barring the need for further discussion. The only

¹³⁸⁶ Paragraph 1007, Offshore Turnkey Drilling Contract – US. This provision does not change whether the drilling is being conducted on a daywork or turnkey basis.

¹³⁸⁷ *Ibid*, para. 1008.

¹³⁸⁸ *Ibid*, para. 1001.

¹³⁸⁹ *Ibid*, para. 1006.

¹³⁹⁰ This has not been provided for in the model contract, just as in the International Offshore Daywork Drilling Contract. Parties are therefor at liberty to provide for this in their specific contracts.

¹³⁹¹ Paragraph 1017, Offshore Turnkey Drilling Contract – US.

¹³⁹² *Ibid*, para. 1019. The definition of 'Operator's Personnel' in para. 101(e) already includes the operator's subcontractor, thus para. 1019 is only emphasising the extent of indemnities already discussed.

¹³⁹³ *Ibid*, para. 1014.

¹³⁹⁴ *Ibid*, para 1011(a). Paragraph 1012(a) allocates the same risk on a daywork basis.

¹³⁹⁵ *Ibid*, para. 1015.

¹³⁹⁶ *Ibid*, paras 1101–1104. Although the operator is not expressly mandated to maintain insurance in the same way that the contractor does, both parties are required to specify the other party as additional insureds in their respective insurance policies. The provision also confirms that the operator shall waive the right of subrogation against the contractor only to the extent of liabilities that the operator assumes.

¹³⁹⁷ In Chapter 3, under the heading 'Risk Allocation between Parties to a Drilling Contract', and in the preceding sections in this chapter.

difference is that the responsibility for bearing the economic consequences of these events is allocated to the contractor. For each of the provisions in which risk is allocated on a turnkey basis, there are corresponding provisions that allocate risk on a daywork basis. These events are:

- (a) Loss of, or damage to *Contractor's Downhole Equipment*.¹³⁹⁸
- (b) All pollution *except* that arising from surface activities and contractor equipment.¹³⁹⁹
- (c) Wild well control.¹⁴⁰⁰
- (d) Environmental loss of, or damage to, *Contractor's Items*.¹⁴⁰¹

For the avoidance of doubt, the model contract restates that all indemnities shall apply irrespective of negligence or breach of any legal duty, and gives priority to the contract over all other legal routes that could be the basis of any liability.¹⁴⁰² By this provision, the model contract confirms the intent to indemnify even for own negligence, and in this regard, satisfies the judicial requirement for clear expression of this intent.

6.3 Footage Contracts

Aside from the fact that there is no record of footage contracts being used as a basis for offshore drilling operations,¹⁴⁰³ none of the organisations that are the focus of this study has developed a model footage contract for offshore drilling operations. In this regard, this study finds that it is both needless and irrelevant to discuss such contracts.

6.4 Risks Allocation Matrix in Model Drilling Contracts

¹³⁹⁸ Paragraph 1002, Offshore Turnkey Drilling Contract – US. Paragraph 1003 allocates the same risk on a daywork basis.

¹³⁹⁹ *Ibid*, para 1011(b). Paragraph 1012(b) allocates the same risk on a daywork basis.

¹⁴⁰⁰ *Ibid*, para 1009. Paragraph 1010 allocates the same risk on a daywork basis.

¹⁴⁰¹ *Ibid*, para 1004. Paragraph 1005 allocates the same risk on a daywork basis.

¹⁴⁰² *Ibid*, paras 1018 and 1020.

¹⁴⁰³ See, for instance, Moomjian, C. A. (1999) 'Contractual Insurance and Risk Allocation in the Offshore Drilling Industry', *Drilling Contractor*, March/April at p. 17. See also Anderson, O. L. (1989) 'The Anatomy of an Oil and Gas Drilling Contract', *supra*, at p. 371.

The allocation of risks for daywork contracts, discussed in the foregoing sections of this chapter, are presented in a tabular form hereunder, together with a summary of risk allocation matrix.

Risk Allocation Matrix - Daywork Contracts

<i>Risk Allocation Provision</i>	<i>Mobile Drilling Rigs Contract, Edition 1</i>		<i>International Offshore Daywork Drilling Contract</i>		<i>CAODC/CAPP Master Daywork Contract</i>		<i>Major Operator</i>	
	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>
Death of, or personal injury to <i>Contractor Group Personnel</i>	Art.18.1(b): Contractor is responsible, and indemnifies and holds operator harmless.	Art.18.1(b): Operator has no responsibility for this under the knock-for-knock provisions.	Para 903: Contractor is responsible, and indemnifies and holds operator harmless.	Para 903: Operator has no responsibility for this under the knock-for-knock provisions.	Art. 10.6: Contractor is responsible, and indemnifies and holds operator harmless.	Art. 10.6: Operator has no responsibility for this under the knock-for-knock provisions.	Clause 13.2(b): Contractor is responsible, and indemnifies and holds operator harmless.	Clause 13.2(b): Operator has no responsibility for this under the knock-for-knock provisions.
Death of, or personal injury to <i>Operator Group Personnel</i>	Art.18.2(b): Contractor has no responsibility for this under the knock-for-knock provisions.	Art.18.2(b): Operator is responsible, and indemnifies and holds contractor harmless.	Para 904: Contractor has no responsibility for this under the knock-for-knock provisions.	Para 904: Operator is responsible, and indemnifies and holds contractor harmless.	Art. 10.7: Contractor has no responsibility for this under the knock-for-knock provisions.	Art. 10.7: Operator is responsible, and indemnifies and holds contractor harmless.	Clause 13.2(a): Contractor has no responsibility for this under the knock-for-knock provisions.	Clause 13.2(a): Operator is responsible, and indemnifies and holds contractor harmless.
Loss of, or damage to <i>Contractor's Items and Property</i>	Art.18.1(a): Contractor is responsible, and indemnifies and holds operator harmless.	Art.18.1(a): Operator has no responsibility for this under the knock-for-knock provisions.	Para 901(a): Contractor is responsible, and indemnifies and holds operator harmless to the extent of contractor's insurance	Para 901(a)(4): Operator has residual liability if damage exceeds contractor's insurance cover.	Art. 10.1: Contractor is responsible, and indemnifies and holds operator harmless.	Art. 10.1: Operator has no liability except it takes over drilling operations.	Clause 13.3(b): Contractor is responsible, and indemnifies and holds operator harmless.	Clause 13.3(b): Operator has no responsibility for this under the knock-for-knock provisions.

<i>Risk Allocation Provision</i>	<i>Mobile Drilling Rigs Contract, Edition 1</i>		<i>International Offshore Daywork Drilling Contract</i>		<i>CAODC/CAPP Master Daywork Contract</i>		<i>Major Operator</i>	
	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>
Loss of, or damage to <i>Operator's Items and Property</i>	Art.18.2(a): Contractor has no responsibility for this under the knock-for-knock provisions.	Art.18.2(a): Operator is responsible, and indemnifies and holds contractor harmless.	Para. 901(c): Contractor has no responsibility for this under the knock-for-knock provisions.	Para. 901(c): Operator is responsible, and indemnifies and holds contractor harmless.	Art. 10.3(a)(ii): Contractor has no liability.	Art. 10.3(a)(ii): Operator is responsible, and indemnifies and holds contractor harmless.	Clause 13.3(a): Contractor has no responsibility for this under the knock-for-knock provisions.	Clause 13.3(a): Operator is responsible, and indemnifies and holds contractor harmless.
Loss of, or damage to <i>Contractor's Surface Equipment</i>	No specific provision.	No specific provision.	No liability.	Appendix D, Para 83(a): Operator is responsible for maintenance and repair.	Art. 10.1: Contractor is responsible, and indemnifies and holds operator harmless.	Art. 10.1: Operator has no liability except it takes over drilling operations.	Clause 13.3(b): Contractor is responsible, and indemnifies and holds operator harmless.	Clause 13.3(b): Operator has no responsibility for this under the knock-for-knock provisions.
Loss of, or damage to <i>Contractor's Downhole Equipment</i>	Art. 18.5: Contractor has residual liability for fair wear and tear or own negligence.	Art. 18.5: Operator is liable to reimburse contractor, except for fair wear and tear or contractor's negligence.	No liability.	Para 901(a)(1): Operator is responsible, and indemnifies and holds contractor harmless to the extent of contractor's insurance	Art. 10.3(a)(i): Contractor has no liability.	Art. 10.3(a)(i): Operator is responsible, and indemnifies and holds contractor harmless.	Clause 13.4: Contractor has residual liability for fair wear and tear or own negligence.	Clause 13.4: Operator is liable to reimburse contractor, except for fair wear and tear or contractor's negligence.
Third-party death, injury or property damage	Art. 18.1(c): Contractor is liable for third party harm	Art. 18.2(c): Operator is liable for third party harm	No specific provision.	No specific provision.	Art. 10.10: Contractor is liable for third party harm	Art. 10.11: Operator is liable for third party harm	Clause 13.8: Contractor is liable for third party harm	Clause 13.8: Operator is liable for third party harm occasioned by

<i>Risk Allocation Provision</i>	<i>Mobile Drilling Rigs Contract, Edition 1</i>		<i>International Offshore Daywork Drilling Contract</i>		<i>CAODC/CAPP Master Daywork Contract</i>		<i>Major Operator</i>	
	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>
	occasioned by contractor's negligence or breach of duty.	occasioned by operator's negligence or breach of duty.			occasioned by contractor's negligence or breach of duty.	occasioned by operator's negligence or breach of duty.	occasioned by contractor's negligence or breach of duty.	operator's negligence or breach of duty.
Consequential losses	Art. 20: Contractor indemnifies and holds operator harmless for own losses.	Art. 20: Operator indemnifies and holds contractor harmless for own losses.	Para 909: Contractor indemnifies and holds operator harmless for own losses.	Para 909: Operator indemnifies and holds contractor harmless for own losses.	Art. 10.14: Contractor indemnifies and holds operator harmless for own losses.	Art. 10.14: Operator indemnifies and holds contractor harmless for own losses.	Clause 14: Contractor indemnifies and holds operator harmless for own losses.	Clause 14: Operator indemnifies and holds contractor harmless for own losses.
Loss or damage caused by subcontractors	Art. 1.4: Contractor indemnifies and holds operator harmless, as subcontractors are part of Contractor Group.	No specific provision as subcontractors are not part of Company Group.	Para 101(d): Contractor indemnifies and holds operator harmless, as subcontractors are part of Contractor Group.	Para 101(e): Operator indemnifies and holds contractor harmless, as subcontractors are part of Operator Group.	Art. 1.1: Contractor indemnifies and holds operator harmless, as subcontractors are part of Contractor Group.	No specific provision as subcontractors are not part of Operator Group.	Clause 1.1: Contractor indemnifies and holds operator harmless, as subcontractors are part of Contractor Group.	Clause 1.1: Operator indemnifies and holds contractor harmless, as subcontractors are part of Operator Group.
Loss of, or damage to well reservoir or sub-surface formation	No liability.	Art. 18.6(c): Operator indemnifies and holds contractor harmless.	No liability.	Paras 902 & 907: Operator indemnifies and holds contractor harmless.	No liability.	Art. 10.3(a)(iii): Operator indemnifies and holds contractor harmless.	No liability.	Clause 13.6(i): Operator indemnifies and holds contractor harmless.
All pollution arising from	Art. 18.4: Contractor	No liability.	Para 905(a): Contractor	No liability.	Art. 10.8: Contractor	No liability.	Clause 13.7: Contractor	No liability.

Risk Allocation Provision	Mobile Drilling Rigs Contract, Edition 1		International Offshore Daywork Drilling Contract		CAODC/CAPP Master Daywork Contract		Major Operator	
	Contractor	Operator	Contractor	Operator	Contractor	Operator	Contractor	Operator
surface activities and contractor equipment	indemnifies and holds operator harmless.		indemnifies and holds operator harmless.		indemnifies and holds operator harmless.		indemnifies and holds operator harmless.	
All pollution <i>except</i> arising from surface activities and contractor equipment	No liability.	Art. 18.3: Operator indemnifies and holds contractor harmless.	No liability.	Para 905(b): Operator indemnifies and holds contractor harmless.	No liability.	Art. 10.9: Operator indemnifies and holds contractor harmless.	No liability.	Clause 13.6: Operator indemnifies and holds contractor harmless.
Environmental loss or damage to <i>Contractor's Items</i>	No liability.	Art. 18.3: Operator indemnifies and holds contractor harmless.	No liability.	Para 901(a)(3): Operator indemnifies and holds contractor harmless.	No liability.	Art. 10.2(b): Operator indemnifies and holds contractor harmless.	No liability.	Clause 13.6(v): Operator indemnifies and holds contractor harmless.
Wild well control	No liability.	Art. 18.6(b): Operator indemnifies and holds contractor harmless.	No liability.	Para 906: Operator indemnifies and holds contractor harmless.	No liability.	Art. 10.3(c): Operator indemnifies and holds contractor harmless.	No liability.	Clause 13.6(iii): Operator indemnifies and holds contractor harmless.
Intellectual property and patent infringement	Art. 16.5: Contractor indemnifies and holds operator harmless for infringements	Art. 16.6: Operator indemnifies and holds contractor harmless for infringements	Para 908: Contractor indemnifies and holds operator harmless for infringements	Para 908: Operator indemnifies and holds contractor harmless for infringements	Art. 15.1: Contractor indemnifies and holds operator harmless for infringements	No specific provision.	Clause 18.5: Contractor indemnifies and holds operator harmless for infringements	Clause 18.6: Operator indemnifies and holds contractor harmless for

<i>Risk Allocation Provision</i>	<i>Mobile Drilling Rigs Contract, Edition 1</i>		<i>International Offshore Daywork Drilling Contract</i>		<i>CAODC/CAPP Master Daywork Contract</i>		<i>Major Operator</i>	
	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>	<i>Contractor</i>	<i>Operator</i>
	caused by contractor.	caused by operator.	caused by contractor.	caused by operator.	caused by contractor.		caused by contractor.	infringements caused by operator.
Insurance cover in respect of liabilities assumed under the contract by the contractor and operator	Art. 19: Contractor is required to maintain requisite insurance to cover assumed liabilities.	No specific provision mandating insurance.	Para 1001: Contractor is required to maintain requisite insurance to cover assumed liabilities.	Para 1001: Operator is required to maintain requisite insurance to cover assumed liabilities.	Art. 11: Contractor is required to maintain requisite insurance to cover assumed liabilities.	Art. 11: Operator is required to maintain requisite insurance to cover assumed liabilities.	Clause 15: Contractor is required to maintain requisite insurance to cover assumed liabilities.	No specific provision mandating insurance.
Liability for punitive and exemplary damages	No specific provision.	No specific provision.	No specific provision.	No specific provision.	No specific provision.	No specific provision.	Clause 13.1(a)(i): Contractor shall indemnify and hold operator harmless.	Clause 13.1(a)(i): Operator shall indemnify and hold contractor harmless.
Indemnification for gross negligence	No specific provision.	No specific provision.	Para 911: Contractor indemnifies and holds operator harmless even for gross negligence.	Para 911: Operator indemnifies and holds contractor harmless even for gross negligence.	No specific provision.	No specific provision.	Clause 13.1(b)(i): Contractor indemnifies and holds operator harmless even for gross negligence.	Clause 13.1(b)(i): Operator indemnifies and holds contractor harmless even for gross negligence.
Liability for Non-Workmanlike Performance	Art. 4.2: Contractor is required to perform	No specific provision.	Paras 505 & 508: Contractor is required to perform	No specific provision.	Art. 5.1: Contractor is required to perform	No specific provision.	Clause 8.1: Contractor is required to perform	No specific provision.

Risk Allocation Provision	Mobile Drilling Rigs Contract, Edition 1		International Offshore Daywork Drilling Contract		CAODC/CAPP Master Daywork Contract		Major Operator	
	Contractor	Operator	Contractor	Operator	Contractor	Operator	Contractor	Operator
	obligations with reasonable care and skill.		obligations with reasonable care and effort.		obligations with due care and diligence, in good workmanlike manner.		obligations in a good, diligent, safe and workmanlike manner	
Wreck or debris removal	Art. 18.7: Contractor indemnifies and holds operator harmless.	Art. 18.6(b): Operator indemnifies and holds contractor harmless in respect of removal of debris from blowouts, etc.	Para 906: Contractor is liable only to the extent of their insurance.	Para 906: Operator retains residual liability if contractor has no insurance or inadequate insurance.	No specific provision.	No specific provision.	Clause 8.9: Contractor indemnifies and holds operator harmless.	No liability.
Liability for Unsound Location	No liability.	Art. 10: No liability provision, however Operator is responsible for providing access to the well location.	No liability.	Para 605: Operator indemnifies and holds contractor harmless.	No liability.	Art. 10.5: Operator indemnifies and holds contractor harmless.	No liability.	Clause 9.3: Operator indemnifies and holds contractor harmless.

Chapter 7

COMPARATIVE ANALYSIS AND DISCUSSION

In this chapter, this study undertakes a comparison of the way in which risk has been allocated in the model contracts examined in the preceding section, which culminated with the development of the risk matrix. This will entail an investigation into the correlation, similarities and differences that exist among the model contracts in the way that they utilise the different contractual tools to allocate risk, such as indemnities, insurance, exclusions and limitation of liability.

The judicial attitude of the English courts to the risk allocation provisions will be discussed simultaneously. Essentially, the discussion will ask and answer the question of how the risk allocation methods will be viewed if they come before a court in England. This discussion will necessarily highlight the perspectives of risk allocation from the standpoints of the contract parties, evidenced in the way in which they have done this in the model contracts.

7.1 Indemnification for Own Negligence and Gross Negligence

All the model contracts have provisions allowing indemnification for own negligence,¹⁴⁰⁴ and each of these provisions is unequivocal as to its intent and effect. For the avoidance of doubt, two of the model contracts – Mobile Drilling Rigs Contract, Edition 1 and International Offshore Daywork Drilling Contract – list the sections that are not subject to indemnification for own negligence, making it even clearer that they intended to allocate risk in this manner. Indemnification for own negligence is allowed in the knock-for-knock provisions, including consequential losses; loss of, or damage to *Operator's Items and Property*; intellectual property and patent infringement; and death of, or personal injury to the respective personnel and subcontractors of the contract parties.

¹⁴⁰⁴ Article 18.8, Mobile Drilling Rigs Contract, Edition 1; para. 911(a), International Offshore Daywork Drilling Contract; Art. 10.13, CAODC/CAPP Master Daywork Contract.

However, as it relates to subcontractors, the contractor in all the model contracts indemnifies the operator for death or injury to the subcontractors, although the Mobile Drilling Rigs Contract, Edition 1 and CAODC/CAPP Master Daywork Contract do not have specific provisions to this effect. In these circumstances, the contractor is exposed to the operator's other contractors in the event of the occurrence of any adverse event.

The attitude of the English courts to risk allocation in this manner has already been noted. If the parties clearly express that intent, and the construction of the whole contract does not contradict that intent, the courts will enforce the provisions as written. Unlike the courts of the USA, which have to enquire as to whether the provisions comply with any applicable anti-indemnity statutes, the courts in England are not under the same burden. There is no equivalent anti-indemnity statute in Canada.¹⁴⁰⁵

Indemnification for gross negligence is considered differently. Only the International Offshore Daywork Drilling Contract allows for indemnification in this way, and the attitude of the English courts to this has been to deny the existence of gross negligence as part of English jurisprudence. Recently, however, this attitude seems to be shifting towards a recognition of the fact that parties must have intended *gross negligence* to mean something other than negligence by inserting it into their contract. Although there is still no firm recognition of the concept, the current willingness to understand whether the parties did intend it to mean something different from ordinary negligence may engender a change in the future in this area of English law.¹⁴⁰⁶

7.2 Exclusion of Liability

¹⁴⁰⁵ Mercier, T., Kane, J. and Nammour, S. (2014) 'Drafting Canadian Oilfield Master Service Agreements: An Overview of Key Clauses and Market Trends', *supra.*, at p. 253.

¹⁴⁰⁶ *Camarata Property Incorporated v Credit Suisse Securities (Europe) Ltd* (2011) EWHC 479 (Comm) at 161.

All the model contracts exclude the liability of the contractor for wild well incidents, environmental loss or damage to *Contractor's Items*, all pollution *except* that arising from surface activities and contractor equipment, and loss of or damage to well reservoir or sub-surface formation as well as for unsound locations. In the same vein, the model contracts exclude the operator's liability for all pollution arising from surface activities and contractor equipment. These provisions also function as *releases*, and the attitude of the English courts is that a release must be unequivocal and unconditional in order to be effective. Where there is a condition attached to the release – for instance, the operator's liability for loss of, or damage to *Contractor's Downhole Equipment* in the Mobile Drilling Rigs Contract, Edition 1 has been made subject to the absence of negligence of the contractor – the courts will be unwilling to find that a release exists unless the condition has been performed.¹⁴⁰⁷ The rationale for this is found in the courts' stance that it is implausible that a contract party will exculpate the other from liability, even when this is attributed to the latter's negligence, unless this is expressed in very clear and unconditional terms.

The exclusion of liability in the model contracts is clear and unequivocal in the provisions highlighted. In this regard, the English courts should have no difficulty in upholding and enforcing them as provided. This is more so when the provisions in the model contracts for third-party death, injury or property damage are considered. Apart from the International Offshore Daywork Drilling Contract, which has no specific provision that addresses these adverse events, all the other model contracts have provisions that exclude the liability of the innocent party in respect of harm done to a third party arising from the negligence of the wrongful party. Again, this exclusion is clear and unequivocal, and should ordinarily be upheld by the English courts. However, this is one of the inevitable circumstances in which an enquiry is required into the negligence of the party who is

¹⁴⁰⁷ *Deepak Fertilisers and Petrochemicals Corp Ltd v Davy McKee (London) Ltd* (1999) 1 All E.R. (Comm) 69; (1999) 1 Lloyd's Rep. 387.

alleged to have caused the ensuing harm. Unless the fault of the wrongful party is apparent and acknowledged, the adverse event could be the start of an acrimonious process to determine culpability – a situation that was sought to be avoided by instituting the knock-for-knock scheme.

7.3 Limitation of Liability

The model contracts are replete with circumstances in which contracting parties have limited their liability in respect of certain adverse events. For instance, the International Offshore Daywork Drilling Contract limits the liability of the contractor for in-hole and subsea equipment to the extent of their insurance.¹⁴⁰⁸ Thereafter, the operator's liability is triggered. Again, in respect of wreck or debris removal, the Mobile Drilling Rigs Contract, Edition 1 limits the operator's liability to harm occasioned by blowouts or other well control incidents, while the International Offshore Daywork Drilling Contract limits the liability of the contractor for the same events to the extent of the contractor's insurance.

English courts recognise the right of contract parties to limit their liability in this way, and so apply the *contra proferentem* rule less rigorously, as they generally prefer parties to limit their liability rather than exclude it entirely.¹⁴⁰⁹ The relaxed attitude of the English courts to limitation of liability leads the study to posit that more rigour should be applied when considering limitation of liability clauses, the consequences of which are dire. At the very minimum, the same level of clarity and intent as is expected of an exclusion clause should be required. The courts should be guided by such factors as the balance of power between the parties, the clarity of the meaning intended by the relevant clause, and the rationale of the stated mechanism for arriving at the relevant limit.

¹⁴⁰⁸ Para. 901(a), International Offshore Daywork Drilling Contract.

¹⁴⁰⁹ *Ailsa Craig Fishing Co v Malvern Fishing Co Ltd and Securicor (Scotland) Ltd* (1983) 1 W.L.R. 964; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 AC 803.

As evidence of equal bargaining strength, the contract could recite that the party that accepts the limitation of liability is deemed to understand that it bears the residual risk of the remaining economic consequences of the occurrence of the relevant risk event. That party then has the choice of taking appropriate steps to manage, mitigate and/or prevent the risk event from occurring, which steps may include taking out insurance to cover that eventuality.

7.4 Insurance

All the model contracts mandate the contractor to take out insurance in respect of the liabilities it has assumed under the contract. These provisions recognise that the contractor's burden of bearing the economic consequences of the occurrence of the adverse events may be too much for it to carry without the benefit of insurance. Risk allocation would be pointless if the responsible party were unable to bear the economic consequences of the adverse events occurring, which is why the model contracts not only mandate the contractor to carry insurance, but also specify the types of insurance as well as the applicable thresholds and limits. Furthermore, the contractor is obliged to show evidence of compliance with the contractual requirement, and the Mobile Drilling Rigs Contract, Edition 1¹⁴¹⁰, International Offshore Daywork Drilling Contract¹⁴¹¹ and the Major Operator model contract¹⁴¹² require the contractor to notify the operator if there are changes to the insurance policies, or in the event of their cancellation.

In respect of the operator, only the International Offshore Daywork Drilling Contract and the CAODC/CAPP Master Daywork Contract mandate the operator to carry insurance to cover their assumed liabilities under the contracts. Although these model contracts allow the operator to self-insure, the contractor is not permitted to do so, except that the CAODC/CAPP Master Daywork

¹⁴¹⁰ Article 19.1.

¹⁴¹¹ Paragraph 1002.

¹⁴¹² Articles 15.3 and 15.4.

Contract allows contractor self-insurance with the operator's consent.¹⁴¹³ Otherwise, the contractors are required to insure with reputable insurers in the open market.

English courts have always enforced the obligation to insure, and especially recognise the *waiver of subrogation* as an exclusion clause that extinguishes the right to subrogate that an insurer possesses to proceed against a third party whose actions caused an insurance loss to the indemnitor, with a view to recovering the amount paid by the insurer to the insured for the loss.¹⁴¹⁴ Where the waiver provision is not contained in the contract, the courts' attitude is that a contractual indemnity is the primary indemnity that a contract party has, enabling insurers to exercise the right of subrogation to recover against the wrongful party. The courts have held that the indemnitee's initiative to insure himself against the same risk to which the insurer seeks to be subrogated will not impact on the obligation of the indemnitor to indemnify the indemnitee, and neither will it diminish the amount payable thereto.¹⁴¹⁵

7.5 Optimality of Risk Allocation

The model contracts examined allocate risk in a similar manner: first, on a knock-for-knock basis in respect of death; personal injury; loss of, or damage to *Operator's* and *Contractor's Items and Property*; and consequential losses; then, on a fault basis in respect of third-party death, personal injury, property loss or damage; intellectual property and patent infringement; and insurance to cover assumed liabilities. The rest of the risks are allocated based on what this study calls '*optimality*', as the risks are allocated by the models to the parties deemed best able to manage the risk and, in the study's construct, best able to bear the economic consequences of the occurrence of the adverse

¹⁴¹³ Article 11.3.

¹⁴¹⁴ *Morris v Ford Motor Co* (1973) QB 792.

¹⁴¹⁵ *Caledonia North Sea Ltd v London Bridge Engineering Ltd* (2002) UKHL4; (2002) 1 Lloyd's Rep 553.

event. For instance, all the model contracts allocate the risk of all pollution arising from surface activities and contractor's equipment to the contractor, while any other pollution from other sources is the operator's liability. Furthermore, all the model contracts allocate the risk of wild well control to the operator, as well as the loss of the hole and the underground formation/reservoir.

This pattern of risk allocation is not a coincidence. A situation in which the model contracts from different regions of the world allocate risk in the same way is not only indicative of an entrenched industry practice, but underpinned by a common understanding and acceptance that risk has been allocated in a way that is equitable, practical and optimal. Indeed, in all the case law examined and discussed, the contention was not whether risk was optimally allocated but whether, in the specific circumstances, the adverse event fell within the ambit of the risk-bearer's responsibility. The decisions then turned on the specific facts and circumstances of the case, without impugning the allocation method of the contract parties. The consistency of this industry practice even after countless number of drilling contracts have been developed from the different models, and even when the contract parties have the power to alter the practice, is a clear indication of the fact that industry accepts this pattern as optimal – the very reason that it has endured till this day. Indeed, even when, post-Macondo, it was thought that this risk allocation would be altered, it has endured, further confirming the notion of its optimality within the industry.

CONCLUSION

The core objective of this study was to examine how English courts interpret risk allocation provisions in oil and gas contracts, using the model contracts as the context for this analysis. In this quest, the study sought to detect any correlation and identify similarities and differences between model contracts, with a view to understanding how risks are allocated between the operator and the contractor.. Among other desirable outcomes, the study aims to assist decision makers in their choice of a suitable template from among the model contracts, taking into consideration the specificities of the operating environment in which it would be utilised. The international nature of the offshore drilling business makes it imperative that the right choice is made, as the drilling contract plays a major role in the outcome of the drilling campaign.

The foregoing discussions in the previous chapters lead to certain conclusions and positions adopted by the study. These positions reflect the contributions that the study makes to the existing body of knowledge and are set out hereunder.

Judicial Attitude of the English Courts to the Model Contracts

The preference of English law as governing jurisdiction for most drilling contracts between parties engaged in cross-border transactions, necessitates enquiry into the judicial attitude of English courts to the manner in which risk is allocated in the model drilling contracts. To aid this enquiry, the study focused on different contractual tools utilised in various model contracts to allocate risk, such as indemnities, insurance, exclusions and limitations of liability. Although these risk allocation mechanisms are not exhaustive of the tools available to contract parties, they are the most frequently used, and represent a fair method of understanding the attitude of English courts to the manner in which contract parties allocate risk *inter se* within the model contracts.

This analysis has shown that model contracts share more similarities than differences in the way they allocate risk between contract parties using the contractual tools detailed above. In this regard, it is no surprise that there is no major difference in the judicial approach of English courts to the manner in which contract parties allocate risk *inter se* within the model contracts. This study highlights the differences in the way that risk is allocated in the model contracts, and the approach of English courts thereto. However, these differences do not considerably tilt the scale in terms of the overarching conclusion that there is no major difference in the manner in which risk is allocated between the contract parties *inter se* in model contracts, and the judicial attitude of English courts thereto. The study has shown how that attitude has evolved, right from the time in which the English courts enforced the fault-based risk allocation regime, and contract parties were left bearing the full brunt of the economic consequences of the occurrence of adverse events they had caused. English courts have made a transition from the bedrock fault-based risk allocation regime, and will now enforce contractual parties' risk allocation provisions if that intent is expressed unequivocally, and construction of the whole contract supports this. The contextual and more objective approach to the interpretation of contract terms necessarily extends to the interpretation of the risk allocation provisions, and the meaning that the courts will ascribe to the provisions is that which a reasonable person, who has the same background knowledge of the contract that the contract parties are reasonably expected to have, would give to it. The English court's judicial attitude has also been demonstrated as being different from their counterparts in the USA as far as indemnification for punitive damages, breach of statutory duty and gross negligence are concerned.

Application of Unfair Contracts Terms Act 1977

The study has also contributed to the debate on the application of the Unfair Contracts Terms Act 1977 (UCTA) to drilling contracts, and takes the position that they – drilling contracts – could be subject to the prohibition of the limitation or exclusion of liability for death or personal injury arising

from negligence. Likewise, the study also concludes that provisions in drilling contracts could be subject to the requirement relating to the test of reasonableness for other heads of liability. This conclusion is reached after analysis of the case law on the subject which shows the shifting attitude of the courts with respect to the scope of coverage of the UCTA. It was previously thought that commercial contracts could not come under the ambit of the UCTA, as it was focused on consumer contracts, but evidence to the contrary has been adduced. English courts have subjected commercial contracts to the test of reasonableness under the UCTA, and have evinced the intent to keep expanding the scope of coverage as the case law on the subject suggests.

Furthermore, the decision of the United Kingdom Supreme Court in the case of *Farstad Supply AS v Enviroco Ltd* which stated that the expression ‘defend, indemnify and hold harmless’ could be regarded as an ‘indemnity’ simpliciter when it operated to determine responsibility for ‘third party exposure’, and as an ‘exclusion’ clause when it operated in circumstances of ‘direct exposure to the other contracting party’, lends credence to the position taken by the study. That position is that the pronouncement of the Supreme Court could potentially trigger the application of the UCTA to drilling contracts, which contain indemnities and exclusion clauses that allocate risk, inter alia, for death, personal injury or property damage. This means that the entities impacted by these events can sometimes be human entities – especially with respect to death and personal injury – and not corporate entities, even though the protection is given at the corporate level to the contracting entity. It is trite that a company carries out its business through human agents, even though it has corporate personality, and is separate and distinct from its shareholders, directors, officers, and employees. Indeed, it is always the death or injury of the employee or officer of the company that forms the basis of the action to establish liability and determine risk allocation, just as it is the same acts of the employee that give rise to vicarious liability. This study, thus, takes the position that the interpretation of “direct exposure to the other contracting party” may refer to the *human entities* of

the contracting party, and not the *corporate entity*. It is therefore possible that the potential application and impact of the UCTA will be triggered, resulting in the exclusion of liability for negligence in the indemnity structures of most offshore oil and gas contracts, including offshore drilling contracts.

Again, the above notwithstanding, the study opines that a contract party utilising any of the model offshore drilling contracts examined in this study can avoid the application of the UCTA, unless it can be imputed to that party as his standard terms of business. Even if they utilise some of the terms of the model contracts, or conduct negotiations thereon, it becomes a question of fact as to whether the resulting terms materially differ from the original terms of the model contract. If no significant difference is established between the two sets of terms, the parties will still be held as contracting on the terms of the model contract, and whether or not the terms will be regarded as ‘standard’ will depend on proof of regularity and frequency of use, and this study posits that it is a question that must be determined by the facts and circumstances of each transaction. Since contract parties can utilise model contracts without necessarily ‘adopting’ them as their standard terms of business, contract parties can avoid the application of the test of reasonableness by clearly disclaiming the intention to adopt the model contract as their standard terms of business. Indeed, to ensure that regularity or frequency of use is not established, contract parties have a perverse incentive to make significant ‘modifications’ to the model contract, arising from negotiations in every contract transaction. It is unlikely that the courts will find that there is regularity or frequency of use if there are several drafts from the same source model contract.

Effectiveness of Risk Allocation Methods

In this study, ‘effectiveness’ enquires into whether the risk allocation methods adopted by contract parties will stand up to judicial scrutiny from an English court’s perspective. This enquiry is against the backdrop of the bedrock position assumed by the courts in the fault-based regime of risk

allocation in which the courts allocated risk based on certain principles and theories of liability. The dissatisfaction with the manner in which the courts undertook this allocation led to the development and utilisation of the risk allocation mechanisms which have been examined in this study. Contract parties went further to codify these mechanisms into model contracts, all with a view to circumventing the fault-based regime of risk allocation, and instituting a regime which was more in line with their expectations, contract objectives and bargaining outcomes.

However, there was a concern as to whether the manner and mechanisms of risk allocation utilised by contract parties would be enforced by the English courts, given the departure from the default risk allocation regime. The study has shown that English courts will enforce the risk allocation manner and mechanisms if the intent of the contract parties is expressed clearly and unequivocally, and construction of whole contract supports this. Thus, the English courts will enforce the provisions of the model contracts which have all utilised the mechanisms examined in this study to allocate risk. The study has found evidence of judicial acceptance that contract parties can utilise the risk allocation mechanisms that have already been examined – indemnities, insurance, exclusions and limitation of liability – to allocate risk contractually. For instance, in *EE Caledonia Ltd v Orbit Valve Co Europe Plc*, indemnities were specifically approved by the court which stated that it was an industry practice that had arisen to cater for the peculiarities of the oil and gas sector, especially in respect of offshore operations. The ability of contractual parties to allocate risk in this manner, and using the mechanisms examined, is founded on the principle of *freedom of contract*, which is recognised in common law and arose from equating free market economy with contract law principles, providing a platform upon which individuals could trade among themselves based on their preferred terms and conditions. The freedom of contract principle is acknowledged by the English courts as enabling contract parties to utilise indemnity and exclusion clauses to release each other from liability, even for their own negligence. In this regard, the courts have demonstrated the

willingness to uphold and enforce the manner and mechanisms of risk allocation proposed by contract parties.

This approach by the English courts is however subject to certain exceptions, chief of which is *public policy*. Even though the freedom of contract principle enables parties to allocate risk as they deem fit, public policy considerations will disallow the exercise of this freedom in certain circumstances – for instance, relating to indemnification or exclusion of liability for fraud. The public policy argument in the UK, which does not bar indemnification for own negligence, is however different from that in the USA, as the courts in the latter jurisdiction make a distinction between indemnification for negligence resulting in *compensatory* damages and *punitive* damages. While the USA courts enforce provisions that indemnify for *compensatory* damages, the public policy argument prevents the enforcement of indemnification for *punitive* damages on the grounds that the latter punishes egregious behaviour.

Thus, the risk allocation mechanisms adopted by contractual parties will be respected and enforced so long as that intent is clearly and unequivocally expressed. If the contractual provisions are clear, the courts will enforce that as being the agreed risk allocation method of the parties, and will not seek to curtail their freedom in this regard.

Development of the *Conscionability* Principle

Another exception to the exercise of the freedom of contract that seems to have emerged from case law arises where the bargaining power of contractual parties is unequal. This can be gleaned from the decisions of the English courts demonstrating their reluctance to alter the will of the parties when they are perceived to be of ‘equal bargaining power’, and by extension, their readiness to intervene when they are not. This is evident from some decisions on commercial contracts relating to penalties, damages and risk allocation. The courts have generally approached the issue of bargaining power

by enquiring, *inter alia*, whether the parties had access to legal advice, or if they were coerced or induced to enter into the contract.

When the courts find that the bargaining power of the contractual parties is unequal, and risk has been allocated in a way that disfavors the weaker party, evidence abounds of the willingness of the courts to invoke the contra proferentem rule, which states that ambiguities in contracts are to be construed against the maker, and in the other party's favour in this circumstance. From the pronouncements of the court as to their unwillingness to invoke this principle where parties are of equal bargaining power, the conclusion can be reached that the courts will invoke the principle to protect the weaker party in appropriate circumstances.

However, the imbalance in the power equation between the parties, and the skewed manner of risk allocation against the weaker party, may not always be addressed by the application of the contra proferentem rule. This study posits that cases that fall into this category should be determined based on what the courts deem unconscionable, and the subjective nature of this enquiry should widen the scope of discretion of the courts in reaching this determination. This study further posits that the demands of justice will, in time, cause the courts to widen the scope of application of the rule on unconscionability and, before long, it may assume the status of a doctrine, such that contracts, in general, may be required to satisfy the conscionability test before they can be enforced.

This position is based on the seeming focus of the courts in protecting perceived weaker parties from unfair bargains, a situation which is limited by the fact that English courts have no overarching jurisdiction to strike down one-sided and unreasonable bargains by commercial parties. Although the Unfair Contracts Terms Act 1977 attempts to do this, yet, its scope is limited only to transactions in which liability has been excluded or limited in circumstances where negligence has caused the adverse events to occur. The study's position recognises that this overarching jurisdiction to strike

down unconscionable bargains may interfere with contractual parties' freedom of contract if improperly exercised, but the study recommends that the courts can modulate this doctrine by guidelines which ensure that the exercise of this jurisdiction is neither arbitrary nor whimsical, but serves to preserve societal mores and expectations that parties should deal fairly with one another. Besides, the courts have stated that a contractual party who has submitted to an unconscionable bargain due to a weaker bargaining position cannot be said to have exercised the freedom of contract, which further lends credence to the study's position on the need for the overarching doctrine of conscionability.

Optimality of Risk Allocation Methods

While *effectiveness* of risk allocation methods in this study enquires into whether the manner in which the contractual parties have allocated risks *inter se* stands up to judicial scrutiny, optimality enquires into the *efficiency* of that allocation. The enquiry into the efficiency of risk allocation investigates whether risk has been allocated to the party who is best able to bear it. The study has found that there are different formulations for determining the contractual party best able to bear a given risk, among which are the ownership of, or access to, resources with which to prevent a certain risk from eventuating, as well as the ability to bear the economic consequences if it does. The study further examined rationales underpinning the manner in which the contractual parties allocate risk *inter se*, ranging from those based on industry practice, as well as those based on legal/economic considerations.

In this regard, the study found that all model contracts allocate responsibility for specified adverse events firstly on a knock-for-knock basis. These events include death of, and personal injury to, members of both *Company* and *Contractor Groups*. Thereafter, risk is allocated based on the contract parties' formulation of the party best suited to bear the risk based on different rationales. For instance, the contractors bear the responsibility for the economic consequences of any damage

to the drilling unit. The rationale for this is premised on the assumption that contractors have the capacity to mitigate risk volatility, given the breadth of their assets or investment relative to the risk of damage of the drilling unit and so should be allocated that contractual risk. This position is based on the thinking that contractors own multiple rigs in respect of which they can source good insurance deals with discounts which can be internalised in day rates. Furthermore, since contractors work for different clients simultaneously, they can leverage their entire contracts portfolio, deploying men, materials and technology across the fleet to optimise individual contracts.

Similarly, the *economic benefit* principle justifies the stance of contractors who posit that the operators should be allocated majority of the risks arising from the drilling contract as they stand to benefit economically from production in the oilfield – assuming that commercial discovery and development have occurred – in which they have proprietary interest long after the drilling contractor has exited the scene.

The above notwithstanding, the study found that the quest for optimality of risk allocation is one that is pursued only by the contractual parties whose interest it is to ensure that they allocate risk as efficiently as possible otherwise their contract objectives may not be achieved. English courts will rarely interfere with, nor seek justification of the allocation methods or rationale, where the bargaining power of the contractual parties is equal. Provided the parties have allocated risk in an effective manner, the English courts will enforce the contract, and the manner in which risk has been allocated *inter se*.

Focus of Risk Allocation in Oil and Gas Contracts

The study was guided by three economic theories – *risk and reward*, *incentives* and *transactional efficiency* – which conceptualise risk from cost and utility perspectives, and view risk as just another resource that is capable of allocation. Flowing from this, the study found that the term ‘risk

allocation' is a misnomer, as far as contractual risk allocation is concerned, as, from the literature, it assumes that a risk event is being allocated, when, in actual fact, it is the economic consequences of the occurrence of an event that are being allocated. Several consequences – *legal, factual, reputational* – can occur upon the happening of a given event, which could have implications different from the *economic* consequences of that same event. The study demonstrates that it is actually the economic consequences of the occurrence of an event that are being allocated, and that the entire notion of risk allocation is a determination of how the economic cost of the occurrence of the particular consequence will be borne by the parties to the contract.

The focus on economic consequences makes it possible to utilise economic theories to understand when risk has been optimally allocated. This is because the theories collectively seek to ensure that transactional costs do not escalate as this would lead to allocative inefficiency which is antithetical to optimality. As detailed above, when contractual parties allocate a specific risk to the party who is best able to bear it, risk is then allocated efficiently, and this ensures that transactional costs are optimised.

Status of Non-operators in Oil and Gas Contracts

Although the contract is primarily between the operator and contractor, the role of the non-operator is crucial as a financial and administrative stakeholder for the overall success of the contract objectives. Depending on the way that the parties' clause in the oil and gas contract is structured, the non-operator may either be disclosed or non-disclosed principals arising from whether the operator contracts for itself and as agents to the non-operators. The issue then arises as to whether non-operators can sue or be sued by the contractor on matters arising from the contract. This is especially against the backdrop of the fact that the contract may itself bar an action against any other party aside from the operator and contractor, with specific verbiage that the contractor shall look only to the operator for the due performance of the contract and is not entitled to commence any

proceedings against any non-operator or principal other than the operator. In effect, the real question is whether the restriction placed by the contract will apply to defeat any attempt by either the non-operator or contractor to initiate and sustain an action between and against each other.

This study finds that this question can be approached in two ways. The first assumes that the principle of concurrent liability in contract and tort makes it possible circumvent the restriction placed by contract, as the other legal routes available are *sui generis*, and can be invoked independently of the contract route. From this perspective, if the duty of care can be established between the non-operator and the contractor, and that duty has been breached, this triggers the tort regime accordingly. This position also enables the contractor sue the non-operator in agency, as the operator is the agent of the non-operator, and is thus answerable for the tort committed by the former.

The second approach sees the restriction placed by the contract as sacrosanct and unassailable, disentitling the contractor and non-operator from pursuing one another otherwise than as prescribed therein. The contract would typically exclude liability notwithstanding the sole, contributory, gross, active or passive negligence of any party, or members of their group, or any breach of contract, tort, duty (statutory or otherwise, whether or not involving fault), or any under any other legal theory (including strict or product liability) that may be applicable. The courts are minded to enforce these provisions as they are deemed to embody the intention of the contractual parties, and therefore the product of negotiations between parties of equal bargaining power.

The two approaches notwithstanding, this study further posits that the possibility of direct action between the non-operator and the contractor presents the potential problem of circularity and circuitry due to the indemnity structure of the contract. For instance, if the non-operator successfully sues the contractor for negligence and recovers damages thereby, the contractor is entitled to claim indemnity from the operator if the contract allows indemnification in that circumstance. For the operator to

meet the indemnity obligation, it may either call on the insurers to settle the claim or issue a cash call on the non-operators under the JOA. In both scenarios, the co-venturers are ultimately responsible for bearing the economic consequences of the indemnity, including the non-operator who recovered the damages from the contractor.

To avoid this circularity, most JOAs provide that only the operator can commence proceedings. Thus, even in circumstances in which the non-operator has a cause of action against the contractor, the non-operator is unable to proceed, and it is doubtful that the operator would proceed against the contractor in circumstances which would create this circularity because of the indemnity structure of the contract.

The discourse in this section details the contributions that the study makes to the existing body of knowledge on the subject matter that it covers. As far as the model contracts that form the case study and context of this enquiry, the overarching conclusion is that there is no significant difference in the way in which they all allocate risk, or in the judicial approach of the English courts thereto. This conclusion then begs the question of why a decision maker would struggle with the choice of which model contract to utilise to develop a drilling contract. The answer to this question can be found in model contracts themselves; each model contract admonishes the user to adapt it to suit their particular circumstance and operating environment. This study theorises that this process of adaptation – usually birthed during negotiations by contract parties – causes confusion and anxiety over the choice of a suitable model contract, as each party seeks to maximise its advantage by skewing the risk allocation in its favour. Success, in this context, is determined by factors such as the balance of power between the contract parties, and the market conditions prevalent at the time of negotiation.

Thus, this study concludes that, while the manner in which risk is allocated in the model contracts is not significantly different, the manner in which contract parties have utilised the model contracts in their resulting contracts, in line with their right to freedom of contract, has created diversity in intent of contract parties and interpretation of contract terms, with each case turning on its own facts. The confusion and anxiety created by this situation is wrongly ascribed to the model contracts, due to the fact that, in most cases, they are the starting point of the negotiation process.

In conclusion, one can assert that this study has undoubtedly achieved its objectives and answered the research question. In making this assertion, it is recognised that risk allocation is an iterative process in which all stakeholders including contract parties, the courts, and legislature, will constantly respond to their actions and interpretations *inter se*, making future research in this area inevitable to keep up with its continuous development.

APPENDICES

APPENDIX A - Mobile Drilling Rigs Contract, Edition 1

MOBILE DRILLING RIG

CONTENTS

1.	DEFINITIONS	1
2.	INTERPRETATIONS	2
3.	COMPANY AND CONTRACTOR REPRESENTATIVES	2
3.1	General	2
3.2	COMPANY REPRESENTATIVE	2
3.3	CONTRACTOR REPRESENTATIVE	3
4.	CONTRACTOR'S GENERAL OBLIGATIONS	3
5.	OFFSHORE TRANSPORTATION	4
6.	CONTRACTOR PROVIDED ITEMS	4
7.	COMPANY PROVIDED ITEMS	4
8.	CONTRACTOR PERSONNEL	5
9.	ASSIGNMENT AND SUBCONTRACTING	6
9.1	Assignment	6
9.2	Subcontracting	6
10.	INGRESS AND EGRESS AT LOCATION	7
11.	VARIATIONS	7
12.	FORCE MAJEURE	7
13.	TERMS OF PAYMENT	8
14.	TAXES AND TAX EXEMPTION CERTIFICATES	9
15.	OWNERSHIP	12
16.	PATENTS AND OTHER PROPRIETARY RIGHTS	12
17.	LAWS AND REGULATIONS	13
18.	INDEMNITIES	13
19.	INSURANCE BY CONTRACTOR	16
20.	CONSEQUENTIAL LOSS	17
21.	CONFIDENTIALITY	17
22.	TERMINATION	18
23.	AUDIT	19

Downloaded version of contract - see printed edition for original © **LOGIC**

	MOBILE DRILLING RIG
24. LIENS	19
25. BUSINESS ETHICS	20
26. GENERAL LEGAL PROVISIONS	20
26.1 Waiver	20
26.2 Independence of the CONTRACTOR	20
26.3 Proper Law and Language	21
26.4 Notices	21
26.5 Status of COMPANY	21
26.6 Entire Agreement	21
26.7 Survivorship	22
27. RESOLUTION OF DISPUTES	22
SAMPLE FORM OF AGREEMENT	23

1. DEFINITIONS

The following definitions shall be used for the purpose of interpreting the CONTRACT. Further definitions not contained in this Clause shall apply to the Section in which they are stated and subsequent Sections.

- 1.1 "AFFILIATE" shall mean any subsidiary or holding company of any company or any other subsidiary of such holding company. For the purpose of this definition, "subsidiary" and "holding company" shall have the meaning assigned to it under Section 736, Companies Act, 1985, as amended by Section 144, Companies Act 1989.
- 1.2 "COMPANY GROUP" shall mean the COMPANY, its CO-VENTURERS, its and their respective AFFILIATES, its and their respective officers and employees (including agency personnel), but shall not include any member of the CONTRACTOR GROUP.
- 1.3 "COMPANY REPRESENTATIVE" shall mean that person referred to in Clause 3.
- 1.4 "CONTRACTOR GROUP" shall mean the CONTRACTOR, its SUBCONTRACTORS, its and their AFFILIATES its and their respective officers and employees (including agency personnel), and the DRILLING UNIT and the legal and beneficial owners thereof, but shall not include any member of the COMPANY GROUP.
- 1.5 "CONTRACT PRICE" shall mean the price for the WORK calculated in accordance with Section III - Remuneration, exclusive of Value Added Tax.
- 1.6 "CONTRACTOR REPRESENTATIVE" shall mean that person referred to in Clause 3.
- 1.7 "CO-VENTURERS" shall mean any co-venturers with the COMPANY from time to time having an interest in the exploration and production licence(s) under which the WORK is being performed and the successors in interest of such CO-VENTURERS or the assignees of any interest of such CO-VENTURERS.
- 1.8 DRILLING UNIT shall mean the drilling rig named in Appendix 1.1 to Section I - Form of Agreement.
- 1.9 "SUBCONTRACT" shall mean any contract between the CONTRACTOR and any party (other than the COMPANY or any employees of the CONTRACTOR) for the performance of any part of the WORK.
- 1.10 "SUBCONTRACTOR" shall mean any party (other than the CONTRACTOR) to a SUBCONTRACT.
- 1.11 "TECHNICAL INFORMATION" shall mean all such information provided by or caused to be provided by the COMPANY pursuant to the CONTRACT.
- 1.12 "UKCS" shall mean the United Kingdom Continental Shelf.
- 1.13 "VARIATION" shall mean any agreed variation pursuant to Clause 11.
- 1.14 "VSSC" shall mean the Vessel Specific Safety Case relevant to the DRILLING UNIT.
- 1.15 "WORK" shall mean all work conducted in the UKCS which the CONTRACTOR is required to carry out in accordance with the CONTRACT.
- 1.16 "WORKSITE" shall mean the lands, waters and other places on, under, in or through which the WORK is to be performed including the DRILLING UNIT, offshore installations, floating construction equipment, vessels (including the area covered

MOBILE DRILLING RIG

by approved anchor patterns) or places of any kind, where equipment, materials or supplies are being obtained, stored or used for the purposes of the CONTRACT.

2. INTERPRETATIONS

- 2.1 All instructions, notices, agreements, authorisations, approvals and acknowledgements shall be in writing. All such documentation together with all correspondence and other documents shall be in the English language.

Nevertheless, if for any reason it is considered necessary by the COMPANY to give an instruction to the CONTRACTOR orally in the first instance, the CONTRACTOR shall comply with such instruction. Any such oral instruction shall be confirmed in writing as soon as is possible under the circumstances, provided that, if the CONTRACTOR confirms in writing any such oral instruction which is not contradicted in writing by the COMPANY without undue delay, it shall be deemed to be an instruction in writing by the COMPANY.

- 2.2 Any reference to statute, statutory provision or statutory instrument shall include any re-enactment or amendment thereof for the time being in force.

3. COMPANY AND CONTRACTOR REPRESENTATIVES**3.1 General**

- (a) The COMPANY REPRESENTATIVE and CONTRACTOR REPRESENTATIVE are the persons named as such in Appendix 1.1 to Section I - Form of Agreement.
- (b) Such representatives, or delegates appointed in accordance with the provisions of this Clause, shall be readily available to enable both the COMPANY and the CONTRACTOR to discharge their obligations under the CONTRACT.
- (c) The COMPANY REPRESENTATIVE and any person authorised by him shall have access at all reasonable times to the WORKSITE and the CONTRACTOR shall afford every facility for and every assistance in obtaining the right of access.

3.2 COMPANY REPRESENTATIVE

- (a) The COMPANY REPRESENTATIVE has the authority to commit the COMPANY in all matters under the CONTRACT and, subject to any delegation of such authority, shall be responsible for issuing to and receiving from the CONTRACTOR all notices, information, instructions and decisions.
- (b) By notice to the CONTRACTOR, the COMPANY REPRESENTATIVE may at any time delegate any of his authority to any nominated deputy, such notice shall specify the specific authority of any such deputy and such notification shall be sent to the CONTRACTOR REPRESENTATIVE.
- (c) The COMPANY may change the COMPANY REPRESENTATIVE at any time and shall notify the CONTRACTOR of any change.
- (d) Except as expressly stated in the CONTRACT, the COMPANY REPRESENTATIVE has no powers to amend the CONTRACT nor to relieve the CONTRACTOR from any of its obligations under the CONTRACT.

MOBILE DRILLING RIG

3.3 CONTRACTOR REPRESENTATIVE

- (a) The CONTRACTOR REPRESENTATIVE has the authority to commit the CONTRACTOR to any course of action within the rights and obligations of the CONTRACTOR under the CONTRACT and, subject to any delegation of such authority, shall be responsible for issuing to and receiving from the COMPANY all notices, information, instructions and decisions.
- (b) The CONTRACTOR REPRESENTATIVE may delegate any of his authority to any nominated deputy, the terms of such delegation being subject to the prior approval of the COMPANY which shall not be unreasonably withheld or delayed.
- (c) The CONTRACTOR shall not change the CONTRACTOR REPRESENTATIVE without cause or any nominated deputy without the prior approval of the COMPANY which shall not unreasonably be withheld or delayed.
- (d) The CONTRACTOR REPRESENTATIVE has no powers to amend the CONTRACT.

4. CONTRACTOR's GENERAL OBLIGATIONS

- 4.1 On the COMMENCEMENT DATE specified in Appendix 1.1 to Section I - Form of Agreement, the CONTRACTOR shall provide the DRILLING UNIT fully equipped as set out in Section IV(b) - Rig Specification. The DRILLING UNIT shall be adequate to conduct the WORK at the location(s) specified by COMPANY and contemplated by this CONTRACT. The DRILLING UNIT and all other equipment, materials and supplies hereinafter specified as being provided by the CONTRACTOR shall be in first class working condition and together with the personnel, shall be provided and maintained by the CONTRACTOR.
- 4.2 The CONTRACTOR shall carry out all of its obligations under the CONTRACT and shall execute the WORK with all due care and diligence and with the skill to be expected of a reputable contractor experienced in the types of work to be carried out under the CONTRACT.
- 4.3 The CONTRACTOR shall take full responsibility for the adequacy, stability and safety of all its operations and methods necessary for the performance of the WORK and shall keep strictly to the provisions of the CONTRACTOR's VSSC and safety management system and, to the extent not inconsistent therewith, the provisions of Section V - Health, Safety and Environment.
- 4.4 Except to the extent that it may be legally or physically impossible or create a hazard to safety or contradict the provisions of the CONTRACTOR's VSSC or safety management system the CONTRACTOR shall comply with and strictly adhere to the COMPANY's instructions and directions on all matters concerning the WORK.
- 4.5 In order to ensure that performance and completion of the WORK are not delayed or impeded the CONTRACTOR shall be responsible for the timely request for COMPANY provided materials, services and facilities.
- 4.6 The COMPANY reserves the right to let other contracts associated with the WORK. The CONTRACTOR shall afford the COMPANY and other contractors of the COMPANY reasonable access and opportunity for the performance of their work or contracts and shall co-operate fully with such parties.
- 4.7 In addition to the requirements of Section V - Health, Safety and Environment, the CONTRACTOR shall notify the COMPANY without delay of any accidents which occur in connection with the carrying out of the WORK. The CONTRACTOR shall

MOBILE DRILLING RIG

also notify the COMPANY of any other incidents which occur which might affect the carrying out of the WORK or the CONTRACT.

5. OFFSHORE TRANSPORTATION

- 5.1 The COMPANY shall provide, at no cost to the CONTRACTOR, all routine and medivac transportation for CONTRACTOR provided personnel, and transportation for CONTRACTOR provided equipment and material which are capable of transportation by helicopter or supply boat between the COMPANY designated helicopter and supply base as specified in Appendix 1.1 to Section I - Form of Agreement and the offshore part of the WORKSITE.
- 5.2 The costs of non-routine transportation requested by the CONTRACTOR may, at the sole option of the COMPANY be recovered from the CONTRACTOR.

6. CONTRACTOR PROVIDED ITEMS

- 6.1 The CONTRACTOR shall provide all items designated as "Provided by CONTRACTOR" in Section IV(c) - Checklist together with further items requested by the COMPANY in accordance with Clause 7.2.
- 6.2 Additionally, the CONTRACTOR shall provide, at its own cost, services, personnel, materials and equipment, plant, consumables and facilities not identified herein which are required for the WORK and which are normally provided by a daywork drilling contractor acting in accordance with good oilfield practice.

7. COMPANY PROVIDED ITEMS

- 7.1 The COMPANY shall provide, at its cost, all items designated as "Provided by COMPANY" in Section IV(c) - Checklist. The CONTRACTOR shall exercise the same degree of care in handling and using the COMPANY's equipment as it would its own equipment.

The CONTRACTOR shall visually inspect all equipment, materials and supplies provided by the COMPANY when delivered into the CONTRACTOR's possession on the DRILLING UNIT and shall immediately notify the COMPANY REPRESENTATIVE of any shortage, error or visually apparent defect.

- 7.2 All services, personnel, materials and equipment, plant, consumables and facilities required for the WORK other than those items designated as "Provided by CONTRACTOR" in Section IV(c) - Checklist or of the type referred to in Clause 6.2 shall be provided by the COMPANY, or, with the CONTRACTOR's agreement, be provided by the CONTRACTOR subject to availability and, without prejudice to the COMPANY's responsibility for the provision of such items, and billed to the COMPANY at the CONTRACTOR's cost plus the appropriate handling charge detailed in Appendix 1.1 to Section I - Form of Agreement.
- 7.3 All equipment, materials and supplies purchased by the CONTRACTOR on behalf of and paid for by the COMPANY, shall at all times be the property of the COMPANY and shall be marked as such and identified as such in the CONTRACTOR's records.

On completion of the WORK, the CONTRACTOR shall return to the COMPANY all equipment, materials and supplies received by the CONTRACTOR from the COMPANY or purchased by the CONTRACTOR for the COMPANY's account and not consumed in the operations which are still in the CONTRACTOR's possession or control.

MOBILE DRILLING RIG

8. CONTRACTOR PERSONNEL

- 8.1 The CONTRACTOR shall provide personnel in the numbers and classifications set forth in Section IV(d) - Personnel. During any period of time that the CONTRACTOR fails to provide full crews as defined in Section IV(d) - Personnel for more than forty-eight (48) hours, the day rate then applicable shall be reduced by an amount equal to the rate for the missing crew member(s) specified in Section IV(d) - Personnel.
- 8.2 All personnel employed on the WORK shall for the work which they are required to perform be competent, properly qualified, skilled and experienced in accordance with good industry practice. The CONTRACTOR shall verify all qualifications of key personnel identified as such in Section IV(d) - Personnel.
- 8.3 Key personnel of the CONTRACTOR identified as such in Section IV(d) - Personnel shall not be replaced without the prior approval of the COMPANY. As far as reasonably practicable, any replacement shall work with the person to be replaced for a reasonable handover period.
- 8.4 The CONTRACTOR shall ensure that such key personnel of the CONTRACTOR and SUBCONTRACTORS shall read, write and speak fluent English.
- 8.5 The CONTRACTOR shall make its own arrangements for the engagement of personnel, local or otherwise, and, save in so far as the CONTRACT otherwise provides, for their payment and onshore transport, housing, maintenance and board and lodging.
- 8.6 The CONTRACTOR shall be as responsible for any WORK performed by any agency staff and by any other person provided by the CONTRACTOR in connection with the WORK as if the WORK was performed by the employees of the CONTRACTOR.
- 8.7 The CONTRACTOR shall ensure that all employees of the CONTRACTOR and any SUBCONTRACTOR engaged in the performance of the WORK comply with applicable laws including immigration laws and where required are in possession of a valid work permit for the duration of the CONTRACT. When requested, details of such work permits shall be submitted to the COMPANY prior to the employee being engaged in the WORK.
- 8.8 The COMPANY may instruct the CONTRACTOR to remove from the WORKSITE any person engaged in any part of the WORK who in the reasonable opinion of the COMPANY is either
- (a) incompetent or negligent in the performance of their duties; or
 - (b) engaged in activities which are contrary or detrimental to the interests of the COMPANY, or
 - (c) not conforming with relevant safety procedures described in Section V - Health, Safety and Environment or persists in any conduct likely to be prejudicial to safety, health or the environment, or
 - (d) not conforming with the requirements of the CONTRACTOR's VSSC or safety management system.

Any such person shall be removed forthwith from the WORKSITE. Any person removed for any of the above reasons shall not be engaged again in the WORK or on any other work of the COMPANY without the prior approval of the COMPANY.

The CONTRACTOR shall provide a suitable replacement for any such person within 24 hours or such longer time as may be agreed by the COMPANY.

MOBILE DRILLING RIG

- 8.9 The CONTRACTOR shall notify the COMPANY immediately of any proposed or actual stoppages of work, industrial disputes or other labour matters affecting or likely to affect the carrying out or completion of the WORK.

When requested by the COMPANY the CONTRACTOR shall also supply to the COMPANY other information in connection with the WORK relating to industrial relations, including but not limited to minimum rates of pay, allowances, amenities, working hours, periods of unpaid leave and overtime.

9. ASSIGNMENT AND SUBCONTRACTING

9.1 Assignment

The COMPANY is entitled to assign the CONTRACT or any part of it or any benefit or interest in or under it to any CO-VENTURER or AFFILIATE of the COMPANY for performance of the WORK, or work of a similar nature as is contemplated hereunder, provided such alternative work is within the UKCS. In addition the COMPANY may make any such assignment to any other third party but only with the prior agreement of the CONTRACTOR which shall not unreasonably be withheld or delayed.

The CONTRACTOR undertakes that, in the event of any assignment described above, it will execute without delay a formal assignment of interest in the CONTRACT to the relevant party, to be effective upon the written assumption by the assignee of all obligations of the COMPANY under the CONTRACT.

The CONTRACTOR shall assign neither the CONTRACT nor any part of it nor any benefit nor interest in or under it without the prior approval of the COMPANY which shall not unreasonably be withheld or delayed.

9.2 Subcontracting

- (a) The CONTRACTOR shall not subcontract the whole of the WORK. The CONTRACTOR shall not subcontract any part of the WORK except to AFFILIATES of the CONTRACTOR without the prior approval of the COMPANY which approval shall not unreasonably be withheld or delayed.
- (b) Before entering into any SUBCONTRACT other than with an AFFILIATE of the CONTRACTOR, whether provided for in the CONTRACT or not, the COMPANY shall be given an adequate opportunity to review the form of SUBCONTRACT, the choice of SUBCONTRACTOR, the part of the WORK included in the SUBCONTRACT and any other relevant details requested by the COMPANY.

Where the COMPANY will be required to reimburse to the CONTRACTOR the sum paid to the SUBCONTRACTOR, any agreed procedure for award of such SUBCONTRACTS included in the CONTRACT shall be followed and the COMPANY shall be entitled to review all relevant aspects of the SUBCONTRACT.

- (c) No SUBCONTRACT shall bind or purport to bind the COMPANY or the CO-VENTURERS. Nevertheless the CONTRACTOR shall ensure that any SUBCONTRACTOR shall be bound by and observe the provisions of the CONTRACT in so far as they apply to the SUBCONTRACT.

Each SUBCONTRACT shall expressly provide for the CONTRACTOR's unconditional right of assignment of the SUBCONTRACT to the COMPANY in the event that the COMPANY terminates the CONTRACT or the WORK.

MOBILE DRILLING RIG

- (d) The CONTRACTOR shall be responsible for all work, acts, omissions and defaults of any SUBCONTRACTOR as fully as if they were work, acts, omissions or defaults of the CONTRACTOR.

10. INGRESS AND EGRESS AT LOCATION

- 10.1 The COMPANY shall provide the CONTRACTOR with sufficient rights of ingress to and egress from the locations where wells are to be drilled. In the event of any restrictions or limitations in the COMPANY's permit which restrict such rights, the COMPANY shall promptly advise the CONTRACTOR in writing of the same. Should the CONTRACTOR be denied access to the location(s) for any reason beyond the CONTRACTOR's control, any time lost thereby shall be paid for at the Standby Rate detailed in Section III - Remuneration.
- 10.2 The COMPANY shall provide the CONTRACTOR with all navigational directions and all information in the COMPANY's possession, concerning existing underwater terrain and obstructions to assist the CONTRACTOR in the safe movement of the DRILLING UNIT. All drilling locations, including the area within the DRILLING UNIT's anchor pattern, shall be surveyed by the COMPANY and the results thereof provided to the CONTRACTOR.

11. VARIATIONS

In the event that the CONTRACTOR or the COMPANY propose to vary the WORK or the terms hereof, such variation shall be subject to mutual agreement of the parties. No such variation shall be effective unless evidenced in writing and signed by both parties.

12. FORCE MAJEURE

- 12.1 Except for the COMPANY's obligation to pay money in accordance with this CONTRACT, neither the COMPANY nor the CONTRACTOR shall be responsible for any failure to fulfil any term or condition of the CONTRACT if and to the extent that fulfilment has been delayed or temporarily prevented by a force majeure occurrence, as hereunder defined, which has been notified in accordance with this Clause and which is beyond the control and without the fault or negligence of the party affected and which, by the exercise of reasonable diligence, the said party is unable to provide against.
- 12.2 For the purposes of this CONTRACT force majeure shall be limited to the following:
- (a) Riot, war, invasion, act of foreign enemies, hostilities (whether war be declared or not), acts of terrorism, civil war, rebellion, revolution, insurrection of military or usurped power;
 - (b) Ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel or radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
 - (c) Pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
 - (d) Earthquake, flood, fire, explosion and/or other natural physical disaster, but excluding weather conditions as such, regardless of severity;
 - (e) Strikes at a national or regional level or industrial disputes at a national or regional level, or strikes or industrial disputes by labour not employed by the

MOBILE DRILLING RIG

affected party its subcontractors or its suppliers and which affect a substantial or essential portion of the WORK;

- (f) Maritime or aviation disasters;
- (g) Changes to any general or local Statute, Ordinance, Decree or other Law, or any regulation or bye-law of any local or duly constituted authority or the introduction of any such Statute, Ordinance, Decree, Law, regulation or bye-law.

- 12.3 In the event of a force majeure occurrence, the party that is or may be delayed in performing the CONTRACT shall notify the other party without delay giving the full particulars thereof and shall use all reasonable endeavours to remedy the situation without delay.
- 12.4 In the event of a force majeure occurrence the Force Majeure Rate shall be payable in accordance with the provisions of Section III - Remuneration.
- 12.5 Following notification of a force majeure occurrence in accordance with Clause 12.3, the COMPANY and the CONTRACTOR shall meet without delay with a view to agreeing a mutually acceptable course of action to minimise any effects of such occurrence.

13. TERMS OF PAYMENT

- 13.1 For the performance and completion of the WORK, the COMPANY shall pay or cause to be paid to the CONTRACTOR the amounts provided in Section III - Remuneration at the times and in the manner specified in Section III and in this Clause.
- 13.2 The CONTRACTOR shall submit to the COMPANY an invoice within thirty (30) days of the end of each calendar month.

The CONTRACTOR shall not be entitled to receive any payment on any invoice received by the COMPANY after the time specified in Appendix 1.1 to Section I - Form of Agreement as the latest time for receipt of invoices. Nevertheless the COMPANY may, at its sole discretion, make payment against any such invoice.
- 13.3 To the extent that payments to be made under the CONTRACT attract Value Added Tax, the proper amount of such tax shall be shown as a separate item on the invoice. Value Added Tax shall be added to the CONTRACT PRICE as appropriate.
- 13.4 Each invoice shall show separately the individual amounts under each of the headings in Section III - Remuneration, and shall quote the COMPANY Contract Reference Number, Title and such other details as may be specified in the CONTRACT.

Each invoice shall be forwarded to the address specified in the CONTRACT.

- 13.5 Within thirty (30) days from receipt of a correctly prepared and adequately supported invoice by the COMPANY at the address specified in Clause 13.4, the COMPANY shall authorise payment in respect of such invoices as follows:-
 - (a) For payments in Sterling the COMPANY shall make payment of the due amount into the bank account of the CONTRACTOR specified in the CONTRACT or otherwise notified by the CONTRACTOR, using the Banker's Automated Clearing System.

MOBILE DRILLING RIG

- (b) For payments in foreign currencies, the COMPANY shall make payment of the due amount in the appropriate currency into the bank account of the CONTRACTOR specified in the CONTRACT or otherwise notified by the CONTRACTOR.
- 13.6 If the COMPANY disputes any items on any invoice in whole or in part or if the invoice is prepared or submitted incorrectly in any respect, the COMPANY shall return a copy of the invoice to the CONTRACTOR advising the CONTRACTOR of the reasons and requesting the CONTRACTOR to issue a credit note for the unaccepted part or whole of the invoice as applicable. The COMPANY shall be obliged to pay only the undisputed part of a disputed invoice in accordance with the provisions of Clause 13.5.
- If any other dispute connected with the CONTRACT exists between the parties the COMPANY may withhold from any money which becomes payable under the CONTRACT the amount which is the subject of the dispute. The COMPANY shall not be entitled to withhold monies due to the CONTRACTOR under any other contracts with the COMPANY as set off against disputes under the CONTRACT, nor shall it be entitled to withhold monies due under the CONTRACT as set off against disputes under any other contract.
- On settlement of any dispute the CONTRACTOR shall submit an invoice for sums due and the COMPANY shall make the appropriate payment in accordance with the provisions of Clause 13.5.
- 13.7 Neither the presentation nor payment nor non-payment of an individual invoice shall constitute a settlement of a dispute, an accord and satisfaction, a remedy of account stated, or otherwise waive or affect the rights of the parties hereunder.
- In particular the COMPANY may correct or modify any sum previously paid in any or all of the following circumstances:
- (a) any such sum was incorrect;
- (b) any such sum was not properly payable to the CONTRACTOR.
- 13.8 If the COMPANY at any time incurs costs which, under the provisions of the CONTRACT, the COMPANY is entitled to recover from the CONTRACTOR, the COMPANY may invoice the CONTRACTOR for such costs, provided always that the COMPANY may deduct the amount of such costs from any amount due, or that may become due to the CONTRACTOR under the CONTRACT. The CONTRACTOR shall pay the COMPANY within thirty (30) days of receipt of invoice any such sums outstanding after such deduction.

14. TAXES AND EXEMPTION CERTIFICATES

- 14.1 The CONTRACTOR shall in accordance with the provision of Clause 17, except as may otherwise be provided in Section III - Remuneration, be responsible for:
- (a) the payment of all taxes, duties, levies, charges and contributions (and any interest or penalties thereon) for which the CONTRACTOR is liable as imposed by any appropriate government authority whether of the United Kingdom or elsewhere, whether or not they are calculated by reference to the wages, salaries, benefits or expenses and other remuneration paid directly or indirectly to persons engaged or employed by the CONTRACTOR; and
- (b) the payment of all taxes, duties, levies, charges and contributions (and any interest or penalties thereon) including but not limited to income, profits, corporation taxes and taxes on capital gains, turnover and added value taxes

MOBILE DRILLING RIG

for which the CONTRACTOR is liable, whether arising in the U.K., its territorial waters, its continental shelf or elsewhere, now or hereafter levied or imposed by any appropriate government authority whether of the United Kingdom or elsewhere, arising from this CONTRACT; and

- (c) compliance with all statutory obligations to make deductions on account of and remit the required amounts to any appropriate government authority whether of the United Kingdom or elsewhere, including, but not limited to income tax, PAYE, national insurance, employee taxes, charges, social security costs, levies and contributions whether or not they are measured by the wages, salaries or other remuneration or benefits paid to persons employed by the CONTRACTOR, or persons providing services in connection with the CONTRACT to the CONTRACTOR, and the imposition of a similar obligation upon any SUBCONTRACTOR or any other person employed by them or providing services to them in connection with the CONTRACT; and
 - (d) ensuring that any SUBCONTRACTOR or any other person employed, or providing services on or in connection with the CONTRACT shall comply with this Clause.
- 14.2 The CONTRACTOR shall supply to the COMPANY all such information, in connection with activities under the CONTRACT, as is necessary to enable the COMPANY to comply with the lawful demands for such information by any appropriate government authority whether of the United Kingdom or elsewhere.
- 14.3 Where the CONTRACTOR, any SUBCONTRACTOR or any other person employed by them, or providing services to them on or in connection with the CONTRACT, is or may become liable for tax as a result of the operation of Section 38 Finance Act 1973 and/or Section 830 Income and Corporation Taxes Act 1988 and/or Section 276 Taxation of Chargeable Gains Act 1992, and if such a person, within forty five (45) days of the COMMENCEMENT DATE, is not able to exhibit to the reasonable satisfaction of the COMPANY that the person is "resident" for tax purpose within the U.K., the CONTRACTOR shall, where the WORK or any part thereof is to be performed within the U.K. and/or within a "designated area", obtain for itself and procure that any such SUBCONTRACTOR or other person employed by them, or providing services to them on or in connection with the CONTRACT obtains a U.K. Inland Revenue Certificate of Exemption in favour of the COMPANY in accordance with the provisions of paragraph 7 of Schedule 15 Finance Act 1973 and any statutory amendment thereto. The CONTRACTOR shall immediately upon receipt thereof, forward a copy of such certificate to the COMPANY or where such certificate is refused, the CONTRACTOR shall upon being so informed, immediately notify the COMPANY of such refusal.

If such Certificate of Exemption is not obtained within forty five (45) days of the COMMENCEMENT DATE, or having been obtained is subsequently withdrawn, the COMPANY shall have the right to make deductions from any amounts due to the CONTRACTOR up to the maximum estimated potential tax liability arising to the person or persons whose certificate of exemption has not been obtained or has been withdrawn, as reasonably computed by the COMPANY, arising out of the CONTRACT.

In the event that any such deductions are made by the COMPANY, these shall be paid to the CONTRACTOR on the receipt by the COMPANY of satisfactory evidence that the CONTRACTOR, SUBCONTRACTOR or other person employed by them or providing services to them on or in connection with the CONTRACT has paid all taxes arising out of the CONTRACT and the Board of Inland Revenue will not be serving a notice on the COMPANY under paragraph 4 of Schedule 15 Finance Act 1973.

MOBILE DRILLING RIG

"designated area" shall for the purpose of this Clause bear the same meaning as that given in Section 38 Finance Act 1973 and/or Section 830 Income and Corporation Taxes Act 1988 and/or Section 276 Taxation of Chargeable Gains Act 1992.

"resident" shall for the purpose of this Clause mean that the company or person is regarded by the Inland Revenue as U.K. resident.

- 14.4 Where any of the WORK involves the performance of construction activities specified in Section 567 (2) Income and Corporation Taxes Act 1988 and such activities are to be performed within the territorial limits of the U.K., the CONTRACTOR shall obtain for itself a U.K. Inland Revenue Certificate of Exemption in accordance with part XIII Chapter IV Income and Corporation Taxes Act 1988. The CONTRACTOR shall immediately upon receipt thereof, forward a copy of such exemption certificate to the COMPANY or shall notify the COMPANY that such exemption certificate has been refused or cancelled.

The COMPANY will, until receipt of such exemption certificate or subsequent to notification by the CONTRACTOR of refusal by the UK Inland Revenue to issue the said exemption certificate or subsequent to notification by the CONTRACTOR of the cancellation of the said exemption certificate, deduct tax at the rate applicable for the labour elements of any payments due to the CONTRACTOR in respect of such construction activities.

The CONTRACTOR shall notify the COMPANY immediately of any change to, or cancellation or renewal of, any such exemption certificate.

- 14.5 The CONTRACTOR shall save, indemnify, defend and hold harmless the COMPANY against all levies, charges, contributions and taxes of the type referred to in this Clause and any interest or penalty thereon which may be assessed, by any appropriate government authority whether of the United Kingdom or elsewhere, on the CONTRACTOR in connection with the CONTRACT and from all reasonable costs directly incurred in connection therewith.
- 14.6 If the COMPANY receives a notice requiring it to pay any levies, charges, contributions or taxes of the types referred to in this Clause and/or any interest or penalty thereon whether with respect to the CONTRACTOR, any SUBCONTRACTOR or any other person employed by them or providing any services to them on or in connection with the CONTRACT, the COMPANY shall forthwith notify the CONTRACTOR who shall work with the COMPANY to make all reasonable endeavours to make any valid appeal against such payment. In the event that the COMPANY is ultimately required to make such payment, the COMPANY may recover from the CONTRACTOR any such sums and all reasonable costs directly incurred in connection therewith and the CONTRACTOR shall within thirty (30) days of receiving written notice from the COMPANY pay to the COMPANY any such sum or the COMPANY shall be entitled to deduct such sums from any monies due, or which may become due, to the CONTRACTOR.
- 14.7 The COMPANY shall save, indemnify, defend and hold harmless the CONTRACTOR against all levies, charges, contributions and taxes of the type referred to in this Clause and any interest or penalty thereon which may be assessed, by any appropriate government authority whether of the United Kingdom or elsewhere, on the COMPANY in connection with the CONTRACT and from all costs incurred in connection therewith, other than those taxes and other matters referred to above which the provisions of this Clause allow the COMPANY to recover from the CONTRACTOR.

15. OWNERSHIP

- 15.1 The COMPANY shall retain title to COMPANY provided items and information, including but not limited to, TECHNICAL INFORMATION and materials and equipment.
- 15.2 All equipment, materials and supplies provided by the CONTRACTOR for permanent incorporation into the WORK shall become and be identified as the property of the COMPANY upon delivery to the offshore part of the WORKSITE or payment by the COMPANY whichever is the earlier.

The CONTRACTOR shall ensure that all CONTRACTOR provided items are free from all liens and/or retention of title claims from any third party.

- 15.3 Title in any supplies, materials and equipment provided by the CONTRACTOR which do not comply with the requirements of the CONTRACT and which are rejected by the COMPANY, shall re-vest immediately in the CONTRACTOR.

Similarly, title in such items provided by the CONTRACTOR for which no payment has been made by the COMPANY and which are no longer required for the purposes of the CONTRACT, shall re-vest in the CONTRACTOR.

16. PATENTS AND OTHER PROPRIETARY RIGHTS

- 16.1 Neither the COMPANY nor the CONTRACTOR shall have the right of use other than for the purposes of the CONTRACT, whether directly or indirectly, of any patent, copyright, proprietary right or confidential know how, trademark or process provided by the other party.
- 16.2 Where any potential patent or registerable right in any country in the world results from developments by the CONTRACTOR which are based wholly on data, equipment, processes, substances and the like in the possession of the CONTRACTOR at the COMMENCEMENT DATE, such rights shall vest in the CONTRACTOR.
- 16.3 Except as provided in Clause 16.2, the COMPANY reserves the sole right to seek patents or registrable rights in any country in the world on any item or idea arising out of or invented during the term of the CONTRACT as a direct result of the WORK. The CONTRACTOR agrees to notify the COMPANY promptly of any potentially patentable or other registrable ideas conceived during the term of or as a direct result of working under the CONTRACT. The CONTRACTOR agrees to provide co-operation in all efforts by the COMPANY to obtain such patents or other registrable rights, and will be reimbursed, by means of a VARIATION a reasonable charge for the extra time and expense required. The COMPANY agrees to grant the CONTRACTOR a royalty free licence either to use any patents or other registrable rights developed out of the CONTRACT or to permit a SUBCONTRACTOR to manufacture or otherwise use the patents or other registrable rights for the ultimate use only of the CONTRACTOR.
- In the event that a patent is obtained as a result of work carried out by a SUBCONTRACTOR then the rights of the CONTRACTOR described in this Clause shall be extended to that SUBCONTRACTOR.
- 16.4 Notwithstanding the provisions of Clause 16.3, the COMPANY may at its sole discretion, give the CONTRACTOR a written release in respect of any such item or idea. The CONTRACTOR agrees to grant the COMPANY a royalty free irrevocable, world-wide licence to use any patent or other registerable right obtained by the CONTRACTOR as a consequence thereof on any such item or idea.

MOBILE DRILLING RIG

- 16.5 The CONTRACTOR shall save, indemnify, defend and hold harmless the COMPANY GROUP from all claims, losses, damages, costs (including legal costs), expenses, and liabilities of every kind and nature for, or arising out of, any alleged infringement of any patent or proprietary or protected right, arising out of or in connection with the performance of the obligations of the CONTRACTOR under the CONTRACT except where such infringement necessarily arises from the TECHNICAL INFORMATION and/or the COMPANY's instructions. However, the CONTRACTOR shall use its reasonable endeavours to identify any infringement in the TECHNICAL INFORMATION and/or the COMPANY's instructions of any patent or proprietary or protected right, and should the CONTRACTOR become aware of such infringement or possible infringement then the CONTRACTOR shall inform the COMPANY immediately.
- 16.6 The COMPANY shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP from all claims, losses, damages, costs (including legal costs), expenses, and liabilities of every kind and nature for, or arising out of, any alleged infringement of any patent or proprietary or protected right arising out of or in connection with the performance of the obligations of the COMPANY under the CONTRACT or the use by the CONTRACTOR of TECHNICAL INFORMATION or materials or equipment supplied by the COMPANY.

17. LAWS AND REGULATIONS

- 17.1 The CONTRACTOR shall abide by and comply with all applicable laws, rules and regulations of any governmental or regulatory body having jurisdiction over the WORK and/or the WORKSITE.
- 17.2 Except as otherwise stated in the CONTRACT, or to the extent that the same can only be legally obtained by the CONTRACTOR, the COMPANY shall obtain all licences, permits, temporary permits and authorisations required by the applicable laws, rules and regulations for the performance of the WORK.
- 17.3 Should the CONTRACTOR experience an increase in its costs due to changes in applicable laws and regulations (including HSE Safety Notices, Guidelines, Guidance Notes, Classification Society Rules and other like documents under which the CONTRACTOR is subject to compliance) including a change in the manner of enforcement or interpretation thereof, or any changes to the DRILLING UNIT's VSSC pursuant to the COMPANY's instructions or required for the COMPANY's locations, any of which became effective after the date specified in Appendix 1.1 to Section I - Form of Agreement the CONTRACTOR shall only be entitled to an adjustment in the CONTRACT PRICE to the extent described in Section III - Remuneration.

18. INDEMNITIES

- 18.1 The CONTRACTOR shall be responsible for and shall save, indemnify, defend and hold harmless the COMPANY GROUP from and against all claims, losses, damages, costs (including legal costs) expenses and liabilities in respect of:
- (a) loss of or damage to property of the CONTRACTOR GROUP whether owned, hired, leased or otherwise provided by the CONTRACTOR GROUP arising from or relating to the performance of the CONTRACT,
 - (b) personal injury including death or disease to any person employed by the CONTRACTOR GROUP arising from or relating to the performance of the CONTRACT,
 - (c) personal injury including death or disease or loss of or damage to the property of any third party to the extent that any such injury, loss or damage

MOBILE DRILLING RIG

is caused by the negligence or breach of duty (whether statutory or otherwise) of the CONTRACTOR GROUP. For the purposes of this Clause "third party" shall mean any party which is not a member of the COMPANY GROUP or CONTRACTOR GROUP.

- 18.2 The COMPANY shall be responsible for and shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP from and against any claims, losses, damages, costs (including legal costs) expenses and liabilities in respect of :
- (a) loss of or damage to property of the COMPANY GROUP arising from or related to the performance of the CONTRACT located at the WORKSITE.
 - (b) personal injury including death or disease to any person employed by the COMPANY GROUP arising from or relating to the performance of the CONTRACT,
 - (c) personal injury including death or disease or loss or damage to the property of any third party to the extent that such injury, loss or damage is caused by the negligence or breach of duty (whether statutory or otherwise) of the COMPANY GROUP. For the purposes of this Clause "third party" shall mean any party which is not a member of the CONTRACTOR GROUP or COMPANY GROUP.
- 18.3 Notwithstanding the provisions of Clause 18.1(c) and except as provided by Clauses 18.1(a), 18.1(b) and 18.4 the COMPANY shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP from and against any claim of whatever nature arising from pollution and/or contamination including without limitation such pollution and/or contamination emanating from the reservoir or from the property of the COMPANY GROUP including oil based muds or similar materials used on the instruction of the COMPANY, the discharge of contaminated cuttings or storage, use or disposal of radioactive sources arising from or related to the performance of the CONTRACT.
- 18.4 Notwithstanding the provisions of Clause 18.2(c) and except as provided by Clauses 18.2(a) and 18.2(b), the CONTRACTOR shall save, indemnify, defend and hold harmless the COMPANY GROUP from and against any claim of whatever nature arising from pollution originating from the hull of the DRILLING UNIT located above or below the surface of the water and/or the other property and equipment of the CONTRACTOR GROUP located above the surface of the water (excluding oil based muds or similar materials used on the instruction of the COMPANY, the discharge of contaminated cuttings or storage, use or disposal of radioactive sources).
- 18.5 Notwithstanding the provisions of Clause 18.1(a) the COMPANY shall reimburse the CONTRACTOR in respect of loss of or damage to property, materials or equipment of the CONTRACTOR GROUP which occurs whilst in-hole below the rotary table, unless due to fair wear and tear, except if such loss or damage is caused by the negligence of the CONTRACTOR, or those SUBCONTRACTORS used by CONTRACTOR to fulfil its obligations to provide equipment detailed in Section IV (b) - Rig Specification or to provide personnel detailed in Section IV(d) - Personnel (but not any other SUBCONTRACTORS).

The COMPANY's liability for such loss or damage shall, subject to the depreciation provision hereunder, be either the actual repair or replacement cost, whichever is the lesser, as substantiated by the CONTRACTOR to the COMPANY REPRESENTATIVE. Where repair is possible, the COMPANY shall, at its sole option, reimburse the CONTRACTOR in respect of either the foregoing repair or the foregoing replacement costs.

Any replacement cost for which the COMPANY is liable hereunder shall be reimbursed to the CONTRACTOR subject to the deduction of depreciation which

MOBILE DRILLING RIG

shall be calculated from the substantiated date of the original purchase, of each item or component part thereof at a percentage rate per month applied to such replacement cost up to a percentage maximum as set out in Appendix 1.1 to Section I - Form of Agreement.

- 18.6 Subject to Clauses 18.1(a), 18.1 (b) and 18.4 and any additional clauses identified in Appendix 1.1 to Section I - Form of Agreement, but notwithstanding anything contained elsewhere in the CONTRACT to the contrary, the COMPANY shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP against all claims, losses, damages, costs (including legal costs) expenses and liabilities, including without limitation liability to third parties, resulting from:
- (a) loss of or damage to any well or hole provided however, in the event that such loss or damage to any well or hole is caused by the negligence of the CONTRACTOR or those SUBCONTRACTORS used by CONTRACTOR to fulfil its obligations to provide equipment detailed in Section IV (b) - Rig Specification or to provide personnel detailed in Section IV(d) - Personnel (but not any other SUBCONTRACTORS), the CONTRACTOR shall, at the request of the COMPANY as its sole remedy and provided the DRILLING UNIT is still on that location, either redrill the same or an equivalent hole to the same depth as such lost hole had been drilled previously, or repair such damaged hole or well to its original state. During such drilling and/or repair operations the CONTRACTOR shall be paid as detailed in Section III - Remuneration;
 - (b) blowout, fire, explosion, cratering or any uncontrolled well condition (including the costs to control a wild well and the removal of debris);
 - (c) damage to the reservoir, geological formation or underground strata or the loss of oil or gas therefrom;
- 18.7 The CONTRACTOR shall be responsible for the removal and when appropriate the marking or lighting of any wreck or debris of the CONTRACTOR GROUP's property or equipment or any part thereof provided by the CONTRACTOR GROUP in relation to the CONTRACT, where required by law, or government authority or where such wreck or debris is interfering with the COMPANY's operations is a hazard to fishing or navigation and shall, except as provided for in Clause 18.2 and 18.3, save, indemnify, defend and hold harmless the COMPANY GROUP in respect of all claims, liabilities, costs (including legal costs), damages and expenses arising out of or in connection with such wreck or debris.
- 18.8 All exclusions and indemnities given under this Clause (save for those under Clauses 18.1(c), 18.2(c), 18.5 and 18.6(a)) and Clause 20 shall apply irrespective of cause and notwithstanding the negligence, breach of duty (whether statutory or otherwise) or other failure of any nature of the indemnified party or any other entity or party and shall apply irrespective of any claim in tort, under contract or otherwise at law.
- 18.9 If either party becomes aware of any incident likely to give rise to a claim under the above indemnities, it shall notify the other and both parties shall co-operate fully in investigating the incident.

19. INSURANCE BY CONTRACTOR

- 19.1 The CONTRACTOR shall procure as a minimum the insurances set out in this Clause and ensure that they are in full force and effect throughout the life of the CONTRACT. All such insurances shall be placed with reputable and substantial insurers, satisfactory to the COMPANY, and shall for all insurances (including insurances provided by SUBCONTRACTORS) other than Employers Liability Insurance/Workmen's Compensation to the extent of the liabilities assumed by the CONTRACTOR under the CONTRACT, include the COMPANY, CO-VENTURERS and its and their respective AFFILIATES as additional assureds and, shall be endorsed to provide that underwriters waive any rights of recourse, including in particular subrogation rights against the COMPANY, CO-VENTURERS and its and their respective AFFILIATES in relation to the CONTRACT. Such insurances shall also where possible, provide that the COMPANY shall be given not less than 30 days notice of cancellation of or material change to cover. The provisions of this Clause 19 shall in no way limit the liability of the CONTRACTOR under the CONTRACT.
- 19.2 The insurances required to be effected under Clause 19.1 shall be as follows (to the extent that they are relevant to the WORK) :
- (a) Employers Liability and/or (where the jurisdiction of where the WORK is to be performed or under which the employees employed requires the same) Workmen's Compensation insurance covering personal injury to or death of the employees of the CONTRACTOR engaged in the performance of the WORK to the minimum value required by any applicable legislation including extended cover (where required) for working offshore or such greater sum as is set out in Appendix 1.1 to Section I - Form of Agreement.
 - (b) General Third Party Liability insurance for any incident or series of incidents covering the operations of the CONTRACTOR in the performance of the CONTRACT, in an amount not less than that set out in Appendix 1.1 to Section I - Form of Agreement.
 - (c) Third Party and Passenger Liability insurance and other motor insurance as required by applicable jurisdiction.
 - (d) Marine Hull and Machinery Insurance, including, to the extent not provided in (e) below, collision liability in respect of the DRILLING UNIT in an amount not less than that set out in Appendix 1.1 to Section I - Form of Agreement.
 - (e) Protection and Indemnity Insurance including wreck and debris removal and oil pollution liability in respect of the DRILLING UNIT in an amount not less than that set out in Appendix 1.1 to Section I - Form of Agreement.
 - (f) such further insurances (if any) as set out in Appendix 1.1 to Section I - Form of Agreement.
- 19.3 The CONTRACTOR shall supply the COMPANY with evidence of such insurance on demand.
- 19.4 The CONTRACTOR shall procure that SUBCONTRACTORS are insured to appropriate levels as may be relevant to their work.

MOBILE DRILLING RIG

20. CONSEQUENTIAL LOSS

For the purposes of this Clause 20 the expression "Consequential Loss" shall mean indirect losses and/or loss of production, loss of product, loss of use and loss of revenue, profit or anticipated profit.

Notwithstanding any provision to the contrary elsewhere in the CONTRACT and except to the extent of any agreed liquidated damages or any termination remuneration payable to CONTRACTOR and provided for in the CONTRACT, the COMPANY shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP from the COMPANY GROUP's own Consequential Loss and the CONTRACTOR shall save, indemnify, defend and hold harmless the COMPANY GROUP from the CONTRACTOR GROUP's own Consequential Loss.

21. CONFIDENTIALITY

21.1 The CONTRACTOR shall at no time without the prior agreement of the COMPANY either:

- (a) make any publicity releases or announcements concerning the subject matter of the CONTRACT; or
- (b) except as may be necessary to enable the CONTRACTOR to perform its obligations under the CONTRACT, use, reproduce, copy, disclose to, place at the disposal of or use on behalf of any third party or enable any third party to use, peruse or copy any information which:
 - (i) is provided to the CONTRACTOR by or on behalf of the COMPANY, the CO-VENTURERS or its or their AFFILIATES in or in relation to the CONTRACT, or
 - (ii) vests in the COMPANY in accordance with the CONTRACT, or
 - (iii) the CONTRACTOR prepares in connection with the WORK.

21.2 The provisions of Clause 21.1 shall not apply to information which:

- (a) is part of the public domain; or
- (b) was in the possession of the CONTRACTOR prior to award of the CONTRACT and which was not subject to any other obligation of confidentiality owed to the COMPANY; or
- (c) was received from a third party whose possession is lawful and who is under no obligation not to disclose; or
- (d) is required to be disclosed in order to comply with the requirements of any law, rule or regulation of any governmental or regulatory body having jurisdiction over the WORK or the CONTRACTOR, or of any relevant stock exchange; or
- (e) is used or disclosed by the CONTRACTOR five (5) years or more after the completion of the WORK.

21.3 The CONTRACTOR shall ensure that the provisions of this Clause are incorporated in any SUBCONTRACT and that the officers, employees and agents of the CONTRACTOR and of the SUBCONTRACTORS comply with the same.

MOBILE DRILLING RIG

- 21.4 All information provided by the CONTRACTOR which the CONTRACTOR wishes to remain confidential shall be clearly marked as being confidential. The COMPANY shall nevertheless be entitled to use and disclose any such confidential information to third parties to the extent necessary for the execution and maintenance of the project and/or structure and/or facility in connection with which the WORK is to be performed and in relation to any statutory or other legal requirement.

With the above exceptions the COMPANY will take all reasonable measures to protect the confidentiality of such information.

22. TERMINATION

- 22.1 The COMPANY shall have the right by giving notice to terminate all or any part of the WORK or the CONTRACT at such time or times as the COMPANY may consider necessary for any or all of the following reasons :
- (a) to suit the convenience of the COMPANY;
 - (b) if a force majeure condition prevails for the period specified in Appendix 1.1 to Section I - Form of Agreement or longer other than a force majeure condition of a nature referred to in Clause 12.2(g) giving rise to a requirement upon the COMPANY to reimburse the CONTRACTOR pursuant to Clause 17.3;
 - (c) in the event of the CONTRACTOR becoming bankrupt or making a composition or arrangement with its creditors or a winding-up order of the CONTRACTOR being made or (except for the purposes of amalgamation or reconstruction) a resolution for its voluntary winding-up passed or a provisional Liquidator, Receiver, Administrator or Manager of its business or undertaking appointed or presenting a petition or having a petition presented applying for an administration order to be made pursuant to Section 9 Insolvency Act 1986, or possession being taken by or on behalf of the holders of any debenture secured by a Floating Charge of any property comprised in or subject to the Floating Charge, or any equivalent act or thing should be done or suffered under any applicable law;
 - (d) if a breakdown of the CONTRACTOR's equipment unless caused by actions of the COMPANY results in the CONTRACTOR being unable to perform its obligations hereunder for a period of fifteen (15) consecutive days or more;
 - (e) in the event that the CONTRACTOR breaches any of its material obligations hereunder which has or is likely to affect its performance of the WORK and, having received written notice thereof from the COMPANY, fails or refuses within ten (10) days of receiving such written notice to take action satisfactory to the COMPANY in order to ensure that the matter complained of is remedied to the satisfaction of the COMPANY as soon as practicable and/or fails or refuses to continue to take action satisfactory to the COMPANY in order to ensure that the matter complained of is remedied to the satisfaction of the COMPANY as soon as practicable;
 - (f) if the CONTRACTOR does not provide the DRILLING UNIT ready to commence mobilisation to the COMPANY's initial well location within the number of days specified in Appendix 1.1 to Section I - Form of Agreement following the latest COMMENCEMENT DATE specified in Appendix 1.1 to Section I - Form of Agreement and subject to the conditions detailed therein;
 - (g) if the DRILLING UNIT becomes an actual or constructive total loss;
 - (h) if any member of the CONTRACTOR GROUP fails to comply with the provisions of Clause 25.

MOBILE DRILLING RIG

- 22.2 In the event of termination in accordance with 22.1, the CONTRACTOR shall be entitled to payment as follows:
- (a) For termination in accordance with 22.1(a) or (b) the CONTRACTOR shall be entitled to payment as set out in Section III - Remuneration for WORK performed up to the date of termination, together with other sums due under this CONTRACT and the COMPANY shall pay for the demobilisation of the DRILLING UNIT to the Demobilisation port;
 - (b) For termination in accordance with 22.1(d) or (e) the CONTRACTOR shall be entitled to payment as set out in Section III - Remuneration for WORK performed up to the date of termination, together with other sums due under this CONTRACT and except where the termination arises from the CONTRACTOR's default the COMPANY shall pay for the demobilisation of the DRILLING UNIT to the Demobilisation port;
 - (c) For termination in accordance with 22.1(c), (g) and (h) the CONTRACTOR shall be entitled to payment as set out in Section III - Remuneration for WORK performed up to the date of termination, together with other sums due under this CONTRACT;
 - (d) For termination in accordance with 22.1(f) the CONTRACTOR shall not be entitled to payment hereunder.

23. AUDIT

- 23.1 During the course of the WORK and for a period ending two years after completion or termination of the WORK, the COMPANY or its duly authorised representative shall have the right to audit at all reasonable times and, upon request, take copies of all of the CONTRACTOR's records (including data stored on computers), books, personnel records, accounts, correspondence, memoranda, receipts, vouchers and other papers of every kind relating to:

- (a) all invoiced charges made by the CONTRACTOR on the COMPANY, and
- (b) any provision of this CONTRACT under which the CONTRACTOR has obligations the performance of which is capable of being verified by audit.

In this respect the COMPANY shall not be entitled to investigate the make up of rates and lump sums included in the CONTRACT except to the extent necessary for the proper evaluation of any VARIATIONS.

- 23.2 The CONTRACTOR shall co-operate fully with the COMPANY and/or its representatives in the carrying out of any audit required by the COMPANY. The COMPANY will conduct any audit in a manner which will keep to a reasonable minimum any inconvenience to the CONTRACTOR.
- 23.3 The CONTRACTOR shall obtain equivalent rights of audit to those specified above from all SUBCONTRACTORS and will cause such rights to extend to the COMPANY.

24. LIENS

- 24.1 The CONTRACTOR shall not claim any lien, charge or the like on the WORK or on any property of the COMPANY in the possession of the CONTRACTOR or at the WORKSITE.
- 24.2 Without prejudice to any other provisions of this Clause, the CONTRACTOR shall save, indemnify, defend and hold harmless the COMPANY from and against all liens, attachments, charges or claims on the property of the COMPANY by any

MOBILE DRILLING RIG

SUBCONTRACTORS or persons alleging to be SUBCONTRACTORS in connection with or arising out of the CONTRACT.

- 24.3 The CONTRACTOR shall immediately notify the COMPANY of any possible lien, attachment, charge or claim which may affect the WORK or any part thereof.
- 24.4 If at any time there is evidence of any lien, attachment, charge or claim to which, if established, the COMPANY or its property might be subjected, whether made by any persons against the CONTRACTOR or made by any SUBCONTRACTOR or person alleging to be a SUBCONTRACTOR against the COMPANY, then the COMPANY shall have the right to withhold and/or set off or otherwise recover from the CONTRACTOR such sum of money as will fully indemnify the COMPANY against any such lien, attachment, charge or claim.
- 24.5 Before withholding any payment due to the CONTRACTOR in accordance with Clause 24.4, the COMPANY shall give to the CONTRACTOR a reasonable opportunity to demonstrate that the purported lien, attachment, charge or claim is either unenforceable or is covered by the provisions of an enforceable policy of insurance.
- 24.6 For the purpose of this Clause reference to the COMPANY shall include the CO-VENTURERS and its and their AFFILIATES.

25. BUSINESS ETHICS

- 25.1 No member of the CONTRACTOR GROUP shall in relation to the CONTRACT, commit any act whether before, on or after the date of the CONTRACT, which is an offence under the Prevention of Corruption Acts 1889 - 1916, or any statutory amendment, modification or re-enactment thereof, or would have constituted such an offence if:
- (a) such member of the CONTRACTOR GROUP, not being an agent hereunder, was deemed for this purpose to be an agent; or
 - (b) the act, having been committed outside the United Kingdom had been committed within the United Kingdom.

If any member of the CONTRACTOR GROUP fails to comply herewith, the COMPANY may terminate the CONTRACT in accordance with Clause 22.1(h).

26. GENERAL LEGAL PROVISIONS

26.1 Waiver

None of the terms and conditions of the CONTRACT shall be considered to be waived by either the COMPANY or the CONTRACTOR unless a waiver is given in writing by one party to the other.

No failure on the part of either party to enforce any of the terms and conditions of the CONTRACT shall constitute a waiver of such terms.

26.2 Independence of the CONTRACTOR

The CONTRACTOR shall act as an independent contractor with respect to the WORK and shall exercise control, supervision, management and direction as to the method and manner of obtaining the results required by the COMPANY.

MOBILE DRILLING RIG

26.3 Proper Law and Language

The CONTRACT shall be construed and take effect in accordance with English Law excluding those conflict of laws rules and choice of law principles which would deem otherwise, and subject to the provisions of Clause 27, shall be subject to the exclusive jurisdiction of the English Courts.

The ruling language of the CONTRACT shall be the English Language.

26.4 Notices

All notices in respect of the CONTRACT shall be given in writing and delivered by hand, by telex or telefax or by first class post to the relevant address specified in Appendix 1.1 to Section I - Form of Agreement and copied to such other office or offices of the parties as shall from time to time be nominated by them in writing to the other.

Such notices shall be effective:

- (a) if delivered by hand, at the time of delivery;
- (b) if sent by telex or telefax, on the first working day following the date of sending;
- (c) if sent by first class post, 48 hours after the time of posting.

26.5 Status of COMPANY

The COMPANY enters into the CONTRACT for itself and as agent for and on behalf of the other CO-VENTURERS. Notwithstanding the above;

- (a) the CONTRACTOR agrees to look only to the COMPANY for the due performance of the CONTRACT and nothing contained in the CONTRACT will impose any liability upon, or entitle the CONTRACTOR to commence any proceedings against any CO-VENTURER other than the COMPANY;
- (b) the COMPANY, and only the COMPANY is entitled to enforce the CONTRACT on behalf of all CO-VENTURERS as well as for itself. For that purpose the COMPANY shall commence proceedings in its own name to enforce all obligations and liabilities of the CONTRACTOR and to make any claim which any CO-VENTURER may have against the CONTRACTOR;
- (c) All losses, damages, costs (including legal costs) and expenses recoverable by COMPANY pursuant to the CONTRACT or otherwise shall include the losses, costs (including legal costs) and expenses of COMPANY's COVENTURERS and AFFILIATES except that such losses, damages, costs (including legal costs) and expenses shall be subject to the same limitations or exclusions of liability applicable to COMPANY or CONTRACTOR under the CONTRACT.

26.6 Entire Agreement

The CONTRACT constitutes the entire agreement between the parties hereto with respect to the WORK and supersedes all prior negotiations, representations or agreements related to the CONTRACT, either written or oral. No amendments to the CONTRACT shall be effective unless evidenced in writing and signed by the parties to the CONTRACT.

MOBILE DRILLING RIG

26.7 Survivorship

The rights and obligations of the parties detailed in this CONTRACT which by their nature survive termination or expiry of the WORK shall remain in full force and effect after such termination or expiry.

27. RESOLUTION OF DISPUTES

27.1 Any dispute between the COMPANY and the CONTRACTOR in connection with or arising out of the CONTRACT or the WORK shall be resolved by means of the following procedure:

- (a) The dispute shall initially be referred to the COMPANY REPRESENTATIVE and CONTRACTOR REPRESENTATIVE who shall discuss the matter in dispute and make all reasonable efforts to reach an agreement;
- (b) If no agreement is reached under (a) above the dispute shall be referred to the two persons named in Appendix 1.1 to Section I - Form of Agreement. Such persons are nominated one by the COMPANY and one by the CONTRACTOR. Such persons may be replaced by the party which nominated them by notice to the other party;
- (c) If no agreement is reached under (b) above the dispute shall be referred to the senior management of the COMPANY and the CONTRACTOR.

27.2 In the absence of any agreement being reached on a particular dispute either party may take appropriate action in the English Courts to resolve the dispute at any time.

SAMPLE FORM OF AGREEMENT

This CONTRACT is made between the following parties :

----- a company having its registered office at -----

hereinafter called the COMPANY

and

----- having its main or registered office at -----

hereinafter called the CONTRACTOR.

WHEREAS:

- 1) The COMPANY wishes that certain WORK shall be carried out, all as described in the CONTRACT; and
- 2) The CONTRACTOR wishes to carry out the WORK in accordance with the terms of this CONTRACT.

NOW:

The parties hereby agree as follows :

- 1) In this CONTRACT all capitalised words and expressions shall have the meanings assigned to them in this FORM OF AGREEMENT or elsewhere in the CONTRACT.
- 2) The following Sections shall be deemed to form and be read and construed as part of the CONTRACT :

Section I Form of Agreement including Appendix 1.1.

- Section II
- (a) CRINE General Conditions of Contract, Mobile Drilling Rig - Edition 1 - December 1997.
 - (b) Special Conditions of Contract.

Section III Remuneration.

- Section IV
- (a) Scope of Work
 - (b) Rig Specification.
 - (c) Checklist
 - (d) Personnel

Section V Health, Safety and Environment

The Sections shall be read as one document, the contents of which, in the event of ambiguity or contradiction between Sections, shall be given precedence in the order listed, with the exception that the Special Conditions of Contract shall take precedence over the General Conditions of Contract.

Downloaded version of contract - see printed edition for original © **LOGIC**

MOBILE DRILLING RIG

- 3) In accordance with the terms and conditions of the CONTRACT, the CONTRACTOR shall perform and complete the WORK and the COMPANY shall pay the CONTRACT PRICE.
- 4) The terms and conditions of the CONTRACT shall apply from ____/____/____ which date shall be the EFFECTIVE DATE.
- 5) The COMMENCEMENT DATE shall be as specified in Appendix 1.1.
- 6) The duration of the CONTRACT shall be as set out in Appendix 1.1.

The authorised representatives of the parties have executed the CONTRACT in duplicate:

For :

(CONTRACTOR)

Name :

Title :

Date:

For :

(COMPANY)

Name :

Title :

Date:

APPENDIX 1.1 TO SECTION 1 - FORM OF AGREEMENT**Reference****Section 1**

Clause 5 The COMMENCEMENT DATE shall be between _____ and _____ (conditions applicable (see 22.1 (f)) and shall be the date when the DRILLING UNIT is ready, with last anchor racked, to commence tight tow to the COMPANY's first well location.

Clause 6 The duration of the CONTRACT is _____

Section II

Clause 1.8 The DRILLING UNIT shall be the " _____ "

Clause 3.1 The COMPANY REPRESENTATIVE is _____

The CONTRACTOR REPRESENTATIVE is _____

Clause 5.1 The COMPANY designated heliport is _____

The COMPANY designated supply base is _____

Clause 7.2 The handling charges are as follows:

Clause 13.2 Latest time for receipt of invoices is _____

Clause 17.3 Change in law protection commences on _____

Clause 18.5 Depreciation (in-hole tools and subsea equipment)

Clause 18.6 Additional Clauses _____

Clause 19.2 Insurance by the CONTRACTOR, the amounts are:

Employer's Liability _____

General Third Party _____

Marine Hull and Machinery _____

Protection and Indemnity _____

Clause 22.1 (b) Force Majeure Period _____ days

Clause 22.1 (f) Delivery Period past the COMMENCEMENT DATE _____ days

MOBILE DRILLING RIG

Clause 26.4

The address for the service of notices are:

(i) COMPANY _____

(ii) CONTRACTOR _____

Clause 27.1

Resolution of disputes. The nominees are:

(i) COMPANY _____

(ii) CONTRACTOR _____

APPENDIX B - International Offshore Daywork Drilling Contract

November 2007

NOTE: This form contract is a suggested guide only and use of this form or any variation thereof shall be at the sole discretion and risk of the user parties. Users of the form contract or any portion or variation thereof are encouraged to seek the advice of counsel to ensure that their contract reflects the complete agreement of the parties and applicable law. The International Association of Drilling Contractors disclaims any liability whatsoever for loss or damages which may result from use of the form contract or portions or variations thereof.



INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS

INTERNATIONAL OFFSHORE DAYWORK DRILLING CONTRACT

THIS CONTRACT CONTAINS PROVISIONS RELATIVE TO INDEMNITY,
RELEASE OF LIABILITY AND ALLOCATION OF RISK -

SEE PARAGRAPHS 109, 501, 605, 606, 607, 805, 1305 AND ARTICLE IX

THIS AGREEMENT (the "Contract"), dated the _____ day of _____, 20____, is made between _____

_____, a _____ organized under the laws of _____, located at _____

(hereinafter called "Operator"), and _____, a _____ organized under the laws of _____, located at _____

(hereinafter called "Contractor").

WHEREAS, Operator desires to have offshore wells drilled, completed or worked over in the Operating Area and to have performed or carried out all auxiliary operations and services as detailed in the Appendices hereto or as Operator may require; and

WHEREAS, Contractor is willing to furnish the drilling vessel together with drilling and other equipment (hereinafter called the "Drilling Unit"), insurance and personnel, all as detailed in the Appendices hereto, for the purpose of drilling said wells and performing said auxiliary operations and services for Operator.

NOW THEREFORE THIS CONTRACT WITNESSETH that in consideration of the covenants herein it is agreed as follows:

ARTICLE I - INTERPRETATION

101. Definitions

In this Contract, unless the context otherwise requires:

- (a) "Commencement Date" means the point in time that the Drilling Unit either commences jacking operations or commences pulling anchors (whichever is applicable) preparatory to moving the Drilling Unit to Operator's first drilling location under this Contract;
- (b) "Operator's Items" means the equipment, material, services and other facilities owned, rented or leased or otherwise provided by Operator (or Operator's Affiliated Company) or by Operator's Personnel or which are listed in Appendix D that are to be provided by or at the expense of Operator;
- (c) "Contractor's Items" means the Drilling Unit, equipment, material and services owned by Contractor or by Contractor's Personnel or which are listed in Appendices B or D that are to be provided by and at the expense of Contractor;
- (d) "Contractor's Personnel" means the personnel of Contractor and Contractor's subcontractors of any tier, including but not limited to their employees, consultants and other persons to be provided by Contractor from time to time in connection with operations hereunder;
- (e) "Operator's Personnel" means the personnel of Operator and Operator's other contractors and subcontractors of any tier, including but not limited to their employees, consultants and other persons to be provided by Operator from time to time in connection with operations hereunder or present in the Operating Area;
- (f) "Operating Area" means the area specified in Appendix A in which Operator is entitled to conduct drilling operations;
- (g) "Operating Base" means the place onshore designated by Operator and specified in Appendix A;
- (h) "Affiliated Company" means a company or other legal entity which controls or is controlled by Operator or Contractor, or which is controlled by an entity which controls Operator or Contractor. For purposes hereof, control means the ownership, directly or indirectly, of fifty percent (50%) or more of the shares, voting rights or other controlling rights in a company or legal entity. With respect to Contractor, "Affiliated Company" shall also include any Joint Venture Company; and

- (i) "Joint Venture Company" means any company in which Contractor or an Affiliated Company of Contractor owns less than fifty percent (50%) of its shares, voting rights or other controlling rights, and such company provides labor, services, material or equipment to Contractor or in support of Contractor's obligations under this Contract.

102. Currency

In this Contract, all amounts expressed in dollars are United States Dollar amounts.

103. Conflicts

Appendices A, B, C, D, E, and F attached hereto are incorporated herein by reference. If any provision of the Appendices conflicts with a provision in the body hereof, the latter shall prevail.

104. Headings

The paragraph headings shall not be considered in interpreting the text of this Contract.

105. Further Assurances

Each party shall perform the acts, execute and deliver the documents and give the assurances necessary to give effect to the provisions of this Contract.

106. Contractor's Status

Contractor shall be an independent contractor in performing its obligations hereunder.

107. Operator's Status

Operator enters into this Contract on behalf of itself and its co-venturers, co-lessees and joint owners, if any, and agrees that Operator and only Operator may enforce any obligation or rights herein contained expressed or implied to be for the benefit of Operator and/or the co-venturers, co-lessees and joint owners, and Operator and only Operator may commence any action, claim or proceedings against Contractor resulting from, arising out of or in connection with this Contract.

108. Governing Law

This Contract shall be construed, interpreted, enforced and litigated, and the relations between the parties determined in accordance with the General Maritime Law of the United States of America, not including, however, any of its conflicts of law rules which would direct or refer to the laws of another jurisdiction.

The Parties agree that this Contract is not governed by the United Nations Convention on the International Sale of Goods.

109. Governing Language

This Contract may be signed in multiple originals in the English language. All documents produced by a party in the performance of this Contract as well as all written communications of the parties are to be written communications in the English language, which is hereby designated the governing language of the Contract. Contractor and Operator may use any language within their own organizations, except that all subcontracts and all written communications pertaining to such subcontracts shall be in English. *In the event of any dispute concerning the construction or meaning of this Contract, reference shall be made only to this Contract as written in English and not to any translation into any other language, and Operator agrees that Contractor shall have no liability or responsibility for any errors in any translation of this Contract into any other language.*

110. Jurisdiction and Venue

Each of the parties irrevocably agrees that the courts of the jurisdiction specified in Appendix A shall have exclusive jurisdiction to hear and decide any suit, action or proceeding, and/or to settle any dispute which may arise out of or in connection with this Contract (collectively, "Disputes") and, solely for these purposes each party irrevocably submits to the exclusive jurisdiction of the courts of the jurisdiction specified in Appendix A.

Each party irrevocably waives any and all objections it might at any time have to the courts of the jurisdiction specified in Appendix A being nominated as the forum to hear and decide any Disputes and agrees not to claim that the courts of the jurisdiction specified in Appendix A are not a convenient or appropriate forum or venue for any such Dispute and further irrevocably agrees that a judgment in any Dispute brought in any court referred to in this paragraph shall be conclusive and binding upon the parties and may be enforced in the courts of any other jurisdiction.

ARTICLE II-TERM

201. Effective Date

The parties shall be bound by this Contract when each of them has executed it (hereinafter referred to as "Effective Date").

202. Duration

This Contract shall, subject to Paragraphs 203 and 204 below, be for the term specified in Appendix A.

203. Termination

This Contract shall terminate:

- (a) immediately if the Drilling Unit becomes an actual loss or the date Contractor's marine surveyor determines a constructive or arranged total loss to have occurred;
- (b) after the number of wells or on the date specified in Appendix A or, if operations are then being conducted on a well, as soon thereafter as such operations are completed, and the Drilling Unit has been safely jacked up or moored, whichever is applicable, at the demobilization location specified in Appendix A (unless some other location or port is mutually agreed) and all of Operator's Items have been offloaded, whichever is latest; or
- (c) in accordance with Paragraphs 707 or 802.

204. Option to Extend

Operator may extend the duration of this Contract for an additional period by giving notice thereof to Contractor as may be specified in Appendix A. Such extension shall be subject to mutual agreement of the associated rates, terms and conditions by the deadline for notice specified in Appendix A.

205. Continuing Obligations

Notwithstanding the termination of this Contract, the parties shall continue to be bound by the provisions of this Contract that reasonably require some action or forbearance after such termination.

206. Return of Operator's Items

Upon termination of operations, Contractor shall return to Operator on board the Drilling Unit, or as directed by Operator at Operator's sole cost, any of Operator's Items which are at the time in Contractor's possession.

ARTICLE III - CONTRACTOR'S PERSONNEL

301. Obligation to Supply Personnel

Contractor shall provide Contractor's Personnel in accordance with Appendix C.

302. Number, Selection, Hours of Labor and Remuneration

Except where herein otherwise provided, the number, selection, replacement, hours of labor and remuneration of Contractor's Personnel shall be determined by Contractor. Such employees or subcontractors' employees shall be the employees solely of Contractor or its subcontractors.

303. Contractor's Representative

Contractor shall nominate one of its personnel as Contractor's representative who shall be in charge of the remainder of Contractor's Personnel and who shall have full authority to resolve all day-to-day matters which arise between Operator and Contractor.

304. Increase in Contractor's Personnel

Operator may, at any time, with Contractor's approval require Contractor to increase the number of Contractor's Personnel and the rates provided herein shall be adjusted accordingly.

305. Replacement of Contractor's Personnel

Contractor will remove and replace in a reasonable time any of Contractor's Personnel if Operator so requests in writing and if Operator can show reasonable grounds for its request.

ARTICLE IV - CONTRACTOR'S ITEMS

401. Obligation to Supply

Contractor shall provide Contractor's Items and perform the services to be performed by it in accordance with Appendices B and D.

402. Maintain Stocks

Contractor shall be responsible, at its cost, for maintaining adequate stock levels of Contractor's Items as determined by Contractor.

403. Maintain and Repair Equipment

Contractor shall, subject to Paragraph 901 and Appendix D, be responsible for the maintenance and repair of all Contractor's Items and shall provide all spare parts and materials required therefor. Contractor shall, if requested by Operator, also maintain or repair any of Operator's Items on board the Drilling Unit which Contractor is qualified to and can maintain or repair with Contractor's normal complement of personnel and equipment on board the Drilling Unit; provided, however, that Operator shall at its cost provide all spare parts and materials required to maintain or repair Operator's Items, and the basic responsibility and liability for furnishing and maintaining such items shall remain with Operator.

November 2007

ARTICLE V - CONTRACTOR'S GENERAL OBLIGATION501. Contractor's Standard of Performance

Contractor shall carry out all operations hereunder on a daywork basis. For purposes hereof the term "daywork basis" means Contractor shall furnish equipment, labor, and perform services as herein provided, for a specified sum per day under the direction and supervision of Operator (inclusive of any employee, agent, consultant or subcontractor engaged by Operator to direct drilling operations). *When operating on a daywork basis, Contractor shall be fully paid at the applicable rates of payment and assumes only the obligations and liabilities stated herein. Except for such obligations and liabilities specifically assumed by Contractor, Operator shall be solely responsible and assumes liability for all consequences of operations by both parties while on a daywork basis, including results and all other risks or liabilities incurred in or incident to such operations, notwithstanding any breach of representation or warranty, either expressed or implied, or the negligence or fault of any degree or character of Contractor, Contractor's Personnel, its subcontractors, consultants, agents or servants, including sole, concurrent or gross negligence, either active or passive, latent defects or unseaworthiness of any vessel or vessels, including the Drilling Unit (whether or not preexisting), and any liability based on any theory of tort, breach of contract, breach of duty (whether statutory, contractual or otherwise), regulatory or statutory liability, or strict liability, including defect or ruin of premises, either latent or patent*

502. Operation of Drilling Unit

Subject to Paragraph 605, Contractor shall be responsible for the operation of the Drilling Unit, including supervising moving operations and positioning on drilling locations as required by Operator. Operations under this Contract will be performed on a twenty-four (24) hour per day basis.

503. Compliance with Operator's Instructions

Contractor shall comply with all instructions of Operator consistent with the provisions of this Contract, including, without limitation, drilling, well control and safety instructions. Such instructions shall, if Contractor so requires, be confirmed in writing by the authorized representative of Operator. However, Operator shall not issue any instructions which would be inconsistent with Contractor's rules, policies or procedures pertaining to the safety of Contractor's Personnel and/or Contractor's Items, or require Contractor to exceed the rated capacities of Contractor's Items or the minimum or maximum water depths or maximum well depth set forth in Appendix A.

504. Adverse Weather

Contractor, in consultation with Operator, shall decide when, in the face of impending adverse weather conditions, to institute precautionary measures in order to safeguard the well, the well equipment, the Drilling Unit and personnel to the fullest possible extent. Contractor and Operator shall each ensure that each senior representative on board will not act unreasonably in the exercise of their discretion under this Paragraph.

505. Drilling Fluids and Casing Program

Contractor shall take reasonable care to follow Operator's instructions with respect to the drilling fluid and casing program as specified by Operator. Operator shall provide Contractor with these programs reasonably in advance of the spud date of each well to be drilled hereunder.

506. Cutting/Coring Program

Contractor shall save and identify cuttings and cores according to Operator's instructions and place them in containers furnished by Operator.

507. Records to be Kept by Contractor

Contractor shall keep and furnish to Operator an accurate record of the work performed and formations drilled on the IADC Daily Drilling Report Form or other form acceptable to Operator. A legible copy of said form signed by Contractor's representative shall be furnished by Contractor to Operator.

508. Difficulties During Drilling

In the event of any difficulty arising which precludes either drilling ahead under reasonably normal procedures or the performance of any other operations planned for a well, Contractor may suspend the work in progress and shall immediately notify the representative of Operator, in the meantime exerting reasonable effort to overcome the difficulty. In the event Contractor is required to drill a relief well(s) or to undertake well control activities, such operations may be subject to the consent of, and additional conditions imposed by, Contractor's underwriters. Any additional premiums and all deductibles shall be for Operator's account during such operations.

509. Well Control Equipment

Subject to Paragraph 706 and Article IX, Contractor shall maintain its well control equipment listed in Appendices B and D in good condition at all times and shall use all reasonable means to prevent and control fires and blowouts and to protect the hole.

510. Inspection of Materials Furnished by Operator

Contractor agrees to visually inspect all materials furnished by Operator before using same and to notify Operator of any apparent defects therein. Contractor shall not be liable for any loss or damage resulting from the use of materials furnished by Operator.

ARTICLE VI - OPERATOR'S OBLIGATIONS601. Equipment and Personnel

Operator shall at its cost provide Operator's Items and Operator's Personnel and perform the services to be provided or performed by it according to Appendix D. In addition to providing the initial supply of Operator's Items, Operator shall be responsible, at its cost, for maintaining adequate stock levels and replenishing as necessary. When, at Operator's request and with Contractor's agreement, Contractor furnishes or subcontracts for certain items or services which Operator is required herein to provide, for purposes of this Contract said items or services shall be deemed to be Operator furnished items or services. Any subcontractors so hired shall be deemed to be Operator's contractor, and Operator shall not be relieved of any of its liabilities in connection therewith. For furnishing said items and services, Operator shall reimburse Contractor its entire cost plus a handling charge as specified in Appendix A.

602. Maintenance and Repair

Operator shall be responsible, at its cost, for the maintenance and repair of all Operator's Items on board the Drilling Unit which Contractor is not qualified to or cannot maintain or repair with Contractor's normal complement of personnel and the equipment on board.

603. Operator's Representatives

Operator may from time to time designate representatives for the purpose of this Contract who shall at all times have access to the Drilling Unit and may, among other things, observe tests, examine cuttings and cores, inspect the work performed by Contractor, or examine the records kept on the Drilling Unit by Contractor. Operator shall designate a senior representative to resolve day-to-day matters requiring decision by Operator who will be present on board the Drilling Unit. Contractor may treat Operator's senior representative on board the Drilling Unit as being in charge of all Operator's Personnel on board. Operator agrees that Operator's Personnel shall be subject to Contractor's policies regarding prohibition of alcoholic beverages, controlled substances, and contraband, including random searches and tests. Operator further agrees that Operator's Personnel who have duties which directly affect the safety of operations under this Contract shall be subject to and in compliance with applicable laws, rules and regulations with respect to drug and alcohol testing.

604. Replacement of Operator's Personnel

Contractor shall have the right to request in writing Operator to remove and replace any Operator's Personnel on board the Drilling Unit if Contractor can show reasonable grounds for such request.

605. Drilling Site and Access

Operator will be responsible for providing all necessary rights of ingress and egress to drilling locations, as well as selecting, marking, and clearing access routes and drilling locations, for providing proper and sufficient certificates, including, without limitation, all consents, licenses, approvals, permits or permission necessary pursuant to applicable laws, rules and regulations to enter upon and operate on the drilling locations, and for notifying Contractor of any obstructions, impediments, faulty bottom conditions or hazards to operations in the area of each drilling location or within the anchor pattern, including but not limited to wellheads, platforms, pipelines, cables, boulders, and mud filled depressions. Should Contractor be denied free access to a location, any time lost by Contractor as a result of such denial shall be paid for at the Standby Rate. Operator will also provide Contractor with soil and sea bottom condition surveys at each drilling location hereunder adequate to satisfy Contractor's marine surveyor. In the event the Drilling Unit is used over a platform, all surveys to determine the structural integrity of the platform will be the responsibility of Operator.

Should seabed conditions be unsatisfactory to properly support or moor the Drilling Unit upon arrival at a drilling location or during operations hereunder, Operator shall continue to pay Contractor the Standby Rate until seabed conditions are ultimately remedied.

Notwithstanding any other provision of this Contract, should there be any obstructions, impediments, faulty bottom conditions or hazards to operations in the access route to a drilling location or at or within the area of a drilling location, including the anchor pattern, and these obstructions, impediments, faulty bottom conditions or hazards to operations damage Contractor's Items, or Contractor's Items damage these obstructions or impediments, or if seabed conditions prove unsatisfactory to properly support or moor the Drilling Unit during operations hereunder, Operator will be responsible for and hold harmless and indemnify Contractor for all resulting damage, including payment of the Standby Rate during required repairs, but Operator will receive credit for any physical damage insurance proceeds received by Contractor as a result of any damage to the Drilling Unit. All expenses associated with improvements to the seabed and repositioning of the Drilling Unit at the drilling location under this Paragraph 605 shall be for Operator's account

606. Custom or Excise Duties, Taxes and Fees

Operator shall pay all import and export charges, customs and excise duties, levies, assessments, taxes and fees including, without limitation, clearing agent's fees, or other similar taxes or fees that are levied on Contractor's and/or Operator's Items (collectively, "Customs Fees"), if Contractor is assessed and/or pays any such Customs Fees, Operator agrees to be responsible for and hold harmless and indemnify Contractor from any and all cost, liability, expense, loss or claims with respect to such Customs Fees, including but not limited to liability or loss arising out of Operator's non-payment of such Customs Fees, including interest, penalties, fines and attorney's fees. In addition, Operator will reimburse Contractor any sums so paid, including gross-up if applicable.

November 2007

607. Taxes

Except as otherwise provided in Appendix A, Operator shall be responsible for all taxes, levies, and assessments imposed on Contractor, Contractor's Items or expatriate members of Contractor's Personnel arising out of or in connection with Contractor's performance under this Contract, including, without limitation corporate and personal income taxes, gross receipts taxes, sales taxes, use or compensating taxes, ad valorem property taxes, value added taxes, stamp duties and any other taxes imposed by the government of the country of operations or any political subdivision thereof, and shall at all times be responsible for and hold harmless and indemnify Contractor from any and all claims and liabilities with respect thereto. When required by the tax laws governing the Operating Area, Operator shall pay directly all such taxes to the proper governmental authority, including gross-up if applicable, and shall furnish Contractor with copies of appropriate tax receipts or other documentation satisfactory to the taxing authorities evidencing payment of the taxes within ninety (90) days of such payment by Operator. Operator shall at all times be responsible for and hold harmless and indemnify Contractor from all liability or loss arising out of non-payment of such taxes or from the failure to provide tax receipts or other suitable documentation, including interest and penalties thereon and for attorney's fees incurred in connection therewith. In the event that Contractor, as a result of operations under this Contract, determines that a tax payment is due to a taxing authority or receives an assessment of tax directly by a taxing authority, Contractor will, prior to making any payment, notify Operator of such determination or assessment. If Contractor is required to pay the tax, Contractor shall invoice Operator for such amount including any additional taxes, interest and penalties levied thereon and Operator agrees to pay such invoice and be responsible for and hold harmless and indemnify Contractor from any and all claims with respect thereto. In addition, Operator will reimburse Contractor any sums so paid, including gross-up if applicable.

608. ISPS Code Compliance (applicable to self-propelled Drilling Units only)

Operator acknowledges that all personnel aboard the Drilling Unit are subject to applicable law, rules and regulations, including without limitation the International Ship & Port Facility Security (ISPS) Code, and Contractor's implementation and enforcement thereof, including the Drilling Unit's Ship Security Plan. In particular, all personnel shall be: (a) prepared to present a valid photographic identification prior to embarking for the Drilling Unit, (b) required to undergo security awareness training aboard the Drilling Unit, (c) subject to tests and verification of identification while aboard the Drilling Unit, and (d) subject to search of their person and personal effects upon embarking and disembarking the Drilling Unit, in addition, at least seven (7) days prior to the commencement of operations under this Contract, Operator will provide Contractor with the contact information in respect of any Operator-provided helicopter and vessel support services in order that Contractor may prepare required declaration of security documentation. In order to minimize the risk of transportation delays, Operator, as soon as practical, and in any event prior to presenting Operator-supplied personnel for travel to the Drilling Unit, will provide the Drilling Unit's master/security officer with the names and employers of such personnel.

609. Drilling Conditions

Operator shall keep Contractor advised as to any potentially hazardous geologic formation or condition that may be encountered in the Operating Area based on Operator's best available information and prior experience.

ARTICLE VII - RATES OF PAYMENT701. Payment

Operator shall pay to Contractor the amounts from time to time due, calculated to the nearest hour, according to the rates of payment herein set forth and in accordance with the other provisions hereof, notwithstanding any breach of representation or warranty, either expressed or implied, or the negligence or fault of any degree or character of Contractor, Contractor's Personnel, its subcontractors, consultants, agents or servants, including sole, concurrent or gross negligence, either active or passive, latent defects or unseaworthiness of any vessel or vessels, including the Drilling Unit (whether or not preexisting), and any liability based on any theory of tort, breach of contract, breach of duty (whether statutory, contractual or otherwise), regulatory or statutory liability, or strict liability, including defect or ruin of premises, either latent or patent.

702. Mobilization Fee

In addition to Operator's obligation to pay the Standby Rate in accordance with Paragraph 705 and to supply Operator's Items, Operator shall pay Contractor a Mobilization Fee as specified in Appendix A which shall be earned on the date the Drilling Unit departs for the Operating Area.

703. Demobilization Fee

In addition to Operator's obligation to pay the Standby Rate in accordance with Paragraph 705 and to supply Operator's Items, Operator shall pay Contractor a Demobilization Fee as specified in Appendix A which shall be earned on the date of termination of this Contract.

704. Operating Rate

The Operating Rate specified in Appendix A will first become payable from the moment when the Drilling Unit arrives at the first drilling location and commences either jacking operations or running anchors (whichever is applicable). The Operating Rate shall continue to be payable throughout the duration of the Contract, except as herein otherwise provided.

705. Standby Rate

The Standby Rate specified in Appendix A will be payable as follows:

- (a) during any period of delay when Contractor is unable to proceed because of adverse sea or weather conditions, including loop, eddy or other adverse currents (including periods required to repair damage caused by such seas, conditions and currents), or as a direct result of an act, instruction or omission of Operator including, without limitation, the failure of any of Operator's Items, or the failure of Operator to issue instructions, provide Operator's Items or furnish services;
- (b) from the Commencement Date until the moment when the Operating Rate first becomes payable;
- (c) during any period after the Commencement Date that the Drilling Unit is under tow, or under way, between drilling locations or in transit to the demobilization location specified in Appendix A after the last well; provided that if, at the termination of this Contract, the Drilling Unit does not go to the demobilization location specified in Appendix A, the period shall be the reasonably estimated time required to go to that location specified in Appendix A;
- (d) during any period after the Commencement Date that the Drilling Unit is undergoing periodic inspections required by Operator or by applicable laws, rules and regulations or for the maintenance of the certification and classification certificates;
- (e) during any period when operations are suspended to repair the Drilling Unit or other Contractor's Items as provided in Paragraph 605 or due to blowout, fire, cratering, shifting or punch through at a drilling location;
- (f) during any period when operations are being conducted hereunder to redrill or repair the hole drilled hereunder which is lost or damaged as a result of Contractor's sole negligence or wilful misconduct;
- (g) as provided in Paragraphs 605 and 901; or
- (h) as may otherwise be specified in the Contract.

706. Rate During Repair

The Repair Rate specified in Appendix A will be payable for any period in excess of the repair time specified in Appendix A per occurrence during which operations are suspended to permit necessary replacement or repair of Contractor's Items, except as provided in Paragraphs 605, 705 and 707. Suspensions for routine maintenance and inspections, such as lubrication, packing of swivels, changing of pump parts, slipping and cutting the drilling line, servicing the top-drive, testing BOP equipment, drill string inspections and any certification inspections, shall not be considered repair time for purposes of this Paragraph.

707. Force Majeure Rate

The Force Majeure Rate specified in Appendix A will be payable during any period in which operations are not being carried on because of Force Majeure as defined in Paragraph 1303, including periods required to repair damage caused by a Force Majeure event. However, after thirty (30) consecutive days, of the continuous existence of the Force Majeure condition the Contract may be terminated at the option of either party, subject to demobilization as provided herein.

708. Additional Payments

Operator shall, in addition, pay to Contractor:

- (a) the cost of any overtime paid by Contractor to Contractor's Personnel in respect of the maintenance or repair on board the Drilling Unit of Operator's Items or other overtime required by Operator;
- (b) Contractor's costs associated with waiting on Operator furnished transportation or for time in excess of two hours in transit to or from the Drilling Unit, or as a direct result of an act, instruction or omission of Operator;
- (c) in the event the Drilling Unit is taken into sheltered waters or harbor for inspection, repair, maintenance, or structural defects, the related rig move costs and harbor expenses will be for Operator's account;
- (d) Contractor's costs associated with evacuations and accommodations of personnel caused by adverse sea or weather or other hazardous conditions;
- (e) Contractor's costs associated with moving Contractor's Items and Personnel, and their personal effects, if Contractor is required to change its Operating Base; and
- (f) Contractor's costs associated with demobilizing and remobilizing Contractor's Personnel as requested by Operator.

709. Variation of Rates

The rates and payment herein set forth shall be revised by the actual amount of the change in Contractor's cost if an event as described below occurs or if the cost of any of the items hereinafter listed shall increase by more than the amount which may be indicated below from Contractor's cost thereof on the Effective Date or by the same amount after the date of any revision pursuant to this Paragraph:

- (a) labor costs, including all payroll burden and benefits paid by Contractor for its employees;
- (b) if Operator requires Contractor to increase the number of Contractor's Personnel;

November 2007

- (c) if it becomes necessary for Contractor to change the work schedule of its personnel or change the location of its Operating Base or Operating Area;
- (d) in the event described in Paragraph 1102;
- (e) if the cost of insurance premiums increases by five percent (5%) or more;
- (f) if the cost of catering increases by five percent (5%) or more; and
- (g) the rates listed herein shall be increased for costs other than those listed above on the Commencement Date and at three (3) month intervals thereafter based on changes in the Bureau of Labor Statistics Oil Field and Gas Field Drilling Machinery Producer Price Index (Series ID WPU119102) as published by the U.S. Department of Labor from that reported for the month of the Effective Date. Said rates shall be increased proportionately by the percentage specified in Appendix A for each change of five percent (5%) in said Index.

710. Change in Law

In the event that the laws, ordinances, rules, regulations, by-laws, orders and the like, including, but not limited to the fiscal, tax laws, tax regulations, and interpretations, whether of governmental, national, federal, state or local authority or other agencies or other authority having jurisdiction over the Operating Area and/or the parties to the Contract and which are or may become applicable or classification society rules change, including changes in the interpretation and enforcement thereof, or practices applicable to the Operating Area following the date specified in Appendix A of this Contract, including any extension thereof, which cause an increase in operating costs or any taxes, duties, fees, expenses and charges assessed or levied against Contractor's Personnel or Contractor's Items or otherwise relating to the Contract, Operator will fully reimburse Contractor for any such increase.

711. Change in Locale of Operating Area

Upon one hundred twenty (120) days written notice to Contractor and subject to Contractor's approval, Operator may change the Operating Area or Operating Base specified in Appendix A. Any new designations will then become the Operating Area or Operating Base in substitution for the preceding designation. In such event, Contractor will proceed to mobilize and move Contractor's Items to the new Operating Area and continue to work under the Contract, provided such change does not result in a breach of Contractor's trading warranties or violate the laws, rules and regulations applicable to Contractor or its Affiliated Companies; provided further that Contractor is able to obtain all insurance required by the Contract, and any other insurance typically carried by Contractor, for operations in the new Operating Area. Operator shall reimburse Contractor all costs associated with changing the Operating Area or Operating Base, including but not limited to the cost to return the Drilling Unit to the original Operating Area or such other point as the Contractor may nominate no further distant than the original Operating Area, and shall pay all set up costs incurred by Contractor on a cost reimbursable basis. In addition, the parties shall adjust the day rates to account for all other increases in the costs of operation between the new and preceding designations.

ARTICLE VIII - INVOICES, PAYMENTS AND LIENS

801. Monthly Invoices

Contractor may invoice Operator at the end of each month, or at the end of each well, if sooner, for all daily charges earned by Contractor. Other charges may be invoiced as earned. Invoices for daily charges will reflect details of the time spent (calculated to the nearest hour) and the rate charged for that time. Invoices for other charges will be accompanied by documentation supporting costs incurred for Operator or other substantiation as reasonably required. Contractor's invoices shall be delivered as specified in Appendix A.

802. Payment

Operator shall pay all invoices within thirty (30) days after the receipt thereof except that if Operator disputes an item invoiced, Operator shall within twenty (20) days after receipt of the invoice notify Contractor of the amount disputed, specifying the reason therefor, and payment of the disputed amount may be withheld until settlement of the dispute, but payment shall be made of any undisputed portion. Any sums (including amounts ultimately paid with respect to a disputed invoice) not paid within thirty (30) days after receipt of invoice shall bear interest at the rate specified in Appendix A or the maximum allowed by law, whichever is less, from said due date until paid. Contractor shall have the right, upon ten (10) days prior written notice, to terminate this Contract if Operator fails or refuses to timely pay Contractor amounts due and owing to Contractor. Unless otherwise specified herein, all payments shall be made in US Dollars.

803. Manner of Payment

All payments due by Operator to Contractor hereunder shall be made by wire transfer or as otherwise agreed in writing to Contractor's bank account which is specified in Appendix A.

804. Financial Guarantee

If required by Contractor, Operator shall, prior to commencing operations under this Contract, provide Contractor with a letter of credit or other financial security in an amount and form acceptable to Contractor. The security shall be worded to make the proceeds payable to Contractor upon presentation of a sight draft by Contractor.

805. Liens and Encumbrances

Operator shall have no right, power or authority to create, incur, or permit to be imposed upon the Drilling Unit any liens or encumbrances whatsoever. Operator shall at all times be responsible for and hold harmless and indemnify Contractor and the

November 2007

owners of the Drilling Unit from and against any and all claims, demands, causes of action, damages, judgments, costs and expenses (including attorney's fees, costs of litigation, and the costs of bonds or other security) which may be incurred or suffered by Contractor or the owners of the Drilling Unit resulting from or arising out of any lien or encumbrance filed, asserted or claimed against the Drilling Unit created, incurred or permitted to be imposed by, through or under Operator.

806. Local Currency Expenditures

Upon Contractor's request, Operator shall pay Contractor in the currency of the country where the Drilling Unit is operating in amounts equal to Contractor's local currency expenditures (including those expenditures incurred locally by Contractor for the account of Operator) and as needed by Contractor. All amounts of currency so paid by Operator to Contractor during the month shall be credited against Contractor's US Dollar monthly invoice for that month at the rate of exchange of US Dollars for the local currency, as published in the Wall Street Journal, in effect on the date Contractor makes the local currency payment.

ARTICLE IX - LIABILITY

900. General

For the purposes of this Article IX, the terms "Affiliated Company", "Contractor's Items", "Operator's Items", "Contractor's Personnel" and "Operator's Personnel" shall have the meanings as defined in Article I.

901. Equipment or Property

- (a) Except as specifically provided herein to the contrary, Contractor shall at all times be responsible for and hold harmless and indemnify Operator from and against damage to or loss of Contractor's property, Contractor's Items, and the property, equipment, material and services of Contractor's Affiliated Companies, partnerships, and limited liability companies, and its and all of their co-owners, partners, co-venturers, joint owners, and its contractors and subcontractors of any tier and the officers, directors, employees, agents, assigns, representatives, managers, consultants, insurers and subrogees of each of the foregoing. To the extent that the proceeds from Contractor's insurance as made available to Contractor do not compensate Contractor therefor,
- (1) Operator shall be responsible for and hold harmless and indemnify Contractor for loss or destruction of or damage to Contractor's drill pipe, drill collars, subs, reamers, bumper subs, stabilizers and other in-hole equipment when such equipment is being used in the hole below the rotary table, normal wear excepted. Abnormal wear and/or damage for which Operator shall be responsible hereunder shall include, but not be limited to, wear and/or damage resulting from the presence of H₂S or other corrosive elements in the hole including those introduced into the drilling fluid, excessive wear caused by sandcutting, damage resulting from excessive or uncontrolled pressures such as those encountered during testing, blowout, or in a well out of control, excessive deviation of the hole from vertical, dog-leg severity, fishing, cementing or testing operations, and from any unusual drilling practices employed at Operator's request. Operator's responsibility for such abnormal wear and/or damage as referred to herein shall include abnormal wear and/or damage to Contractor's choke hoses and manifolds, BOP and other appurtenant equipment. Operator shall pay the cost of repairing damaged equipment if repairable. In the case of equipment lost, destroyed or damaged beyond repair, Operator shall reimburse Contractor an amount equal to the then current replacement cost of such equipment delivered to the Drilling Unit.
- (2) Operator shall be responsible for and hold harmless and indemnify Contractor for damage to or loss of Contractor's subsea and mooring equipment, including without limitation, chains, anchors, the riser, slip joint, choke and kill lines, flexible hoses, hydraulic hoses and guidelines, subsea BOP, shackles, pendant lines and buoys, and shall reimburse Contractor an amount equal to the then current replacement cost of such equipment delivered to the Drilling Unit, or the repair cost, whichever is applicable.
- (3) Operator shall be responsible for and hold harmless and indemnify Contractor for loss or destruction of or damage, including corrosion and contamination, to Contractor's surface equipment resulting from the presence of H₂S, CO₂ or other corrosive elements introduced into the drilling fluid (including elements introduced from the hole), or the presence of naturally occurring radioactive materials (NORM). Operator shall pay the cost of repairing and/or decontaminating damaged equipment if repairable. In the case of equipment lost, destroyed, damaged or contaminated beyond repair, Operator shall reimburse Contractor an amount equal to the then current replacement cost of such equipment delivered to the Drilling Unit. In addition, notwithstanding the provisions of Paragraph 706 of this Contract, the Standby Rate shall apply with respect to any downtime that may occur or result from such loss or damage, including decontamination operations.

November 2007

- (4) Operator shall be responsible for and hold harmless and indemnify Contractor for damage to or loss of the Contractor's Items caused by Operator furnished helicopters, tugs, supply or service vessels. In addition, notwithstanding the provisions of Paragraph 706 of this Contract, the Standby Rate shall apply with respect to any period of time required to repair Contractor's Items downtime that may occur or result from such loss or damage
- (b) Contractor's operating practices require the BOP stack to be operated at one (1) degree or less from vertical to avoid abnormal wear and damage. In the event the stack angle exceeds one (1) degree from vertical, Operator shall be responsible for and hold harmless and indemnify Contractor for loss or damage to Contractor's subsea and in-hole equipment which may result. Operator shall pay the cost of repairing damaged equipment if repairable. In the case of equipment lost, destroyed or damaged beyond repair, Operator shall reimburse Contractor an amount equal to the then current replacement cost of such equipment delivered to the Drilling Unit. In addition, notwithstanding the provisions of Paragraph 706 of this Contract, the Standby Rate shall apply with respect to the period of time required to repair or replace Contractor's subsea and in-hole equipment that may occur or result from such loss or damage.
- (c) Operator shall at all times be responsible for and hold harmless and indemnify Contractor from and against damage to or loss of Operator's property, Operator's Items, and the property, equipment, material and services of Operator's Affiliated Companies, partnerships, and limited liability companies, and its and all of their co-owners, co-lessees, farmers, farmeers, partners, co-venturers, joint owners, and its contractors and subcontractors of any tier (with the exception of Contractor and its subcontractors of any tier) and the officers, directors, employees, agents, assigns, representatives, managers, consultants, insurers and subrogees of each of the foregoing.

902. The Hole

In the event the hole should be lost or damaged at any time, Operator shall be responsible for and hold harmless and indemnify Contractor and its suppliers, contractors and subcontractors of any tier from such damage to or loss of the hole, including all downhole property therein.

903. Contractor's Personnel

Contractor shall at all times be responsible for and hold harmless and indemnify Operator from and against all claims, demands and causes of action of every kind and character on account of bodily injury, illness or death of Contractor's Personnel or Contractor's invitees or damage to their property.

904. Operator's Personnel

Operator shall at all times be responsible for and hold harmless and indemnify Contractor from and against all claims, demands, and causes of action of every kind and character on account of bodily injury, illness or death of Operator's Personnel or Operator's invitees or damage to their property.

905. Pollution and Contamination

Notwithstanding anything to the contrary contained herein, the responsibility for pollution or contamination shall at all times be as follows:

- (a) Contractor shall be responsible for and hold harmless and indemnify Operator for control and removal of pollution or contamination which originates above the surface of the water from spills of fuels, lubricants, motor oils, normal water base drilling fluid and attendant cuttings, pipe dope, paints, solvents, ballast, bilge and garbage wholly in Contractor's possession and control and directly associated with Contractor's equipment and facilities. For purposes hereof the term "normal water base drilling fluid" means drilling fluid which does not exceed toxicity limits specified for offshore discharges by the environmental protection entity having jurisdiction over the Operating Area.
- (b) Operator shall be responsible for and hold harmless and indemnify Contractor and its suppliers, contractors and subcontractors of any tier against all claims, demands, and causes of action of every kind and character (including control and removal of the pollutant involved) arising directly or indirectly from all pollution or contamination (including radioactive contamination), other than that described in Paragraph 905(a) above, which may occur including, but not limited to, that which may result from fire, blowout, cratering, seepage or any other uncontrolled flow of oil, gas, water or other substance, as well as the use of or disposition of radioactive sources, lost circulation and fish recovery materials and fluids, oil emulsion, oil base or chemically treated drilling fluids and attendant cuttings, and drilling fluids other than "normal water base drilling fluid" defined in Paragraph 905(a) above.
- (c) In the event a third party commits an act or omission which results in pollution or contamination for which either Contractor or Operator for whom such party is performing work is held to be legally liable, the responsibility therefor shall be considered, as between Contractor and Operator, to be the same as if the

(International Offshore Daywork Drilling Contract - Page 10)

party for whom the work was performed had performed the same and all of the obligations and limitations set forth in Paragraphs 905(a) and (b) above, shall be specifically applied.

906. Debris Removal and Cost of Control

Operator shall at all times be responsible for and hold harmless and indemnify Contractor for the cost of removal of debris (including Contractor's Items) to the extent that proceeds from Contractor's insurance as made available to Contractor do not compensate Contractor therefor. Operator shall at all times be responsible for and hold harmless and indemnify Contractor for the cost of regaining control of any wild well.

907. Underground Damage

Operator shall at all times be responsible for and hold harmless and indemnify Contractor and its suppliers, contractors and subcontractors of any tier from and against any and all claims on account of injury to, destruction of, or loss or impairment of any property right in or to oil, gas or other mineral substance or water, if at the time of the act or omission causing such injury, destruction, loss, or impairment, said substance had not been reduced to physical possession above the seabed, and for any loss or damage to any formation, strata, or reservoir beneath the seabed.

908. Patent Liability

Contractor shall at all times be responsible for and hold harmless and indemnify Operator from and against any and all loss or liability arising from infringement of patents of the United States covering equipment furnished by Contractor. Operator shall at all times be responsible for and hold harmless and indemnify Contractor from and against any and all loss or liability arising from infringement or alleged infringements of patents covering the property, equipment, methods or processes furnished or directed by Operator.

909. Consequential Damages

Subject to and without affecting the provisions of this Contract regarding the payment rights and obligations of the parties or the risk of loss, release and indemnity rights and obligations of the parties, each party shall at all times be responsible for and hold harmless and indemnify the other party from and against its own special, indirect or consequential damages, and the parties agree that special, indirect or consequential damages shall, notwithstanding any interpretation under applicable law to the contrary, be deemed to include, whether direct or indirect, without limitation, the following: loss of profit or revenue; costs and expenses resulting from business interruptions; loss of or delay in production; loss of or damage to the leasehold, concession, production sharing contract or other similar rights; loss of or delay in drilling or operating rights; cost of or loss of use of property, equipment, materials and services, including without limitation those provided by contractors or subcontractors of every tier or by third parties.

Operator shall at all times be responsible for and hold harmless and indemnify Contractor from and against all claims, demands and causes of action of every kind and character in connection with such special, indirect or consequential damages suffered by Operator's co-owners, co-venturers, co-lessees, farmers, farmees, partners and joint owners.

910. Termination of Location Liability

Notwithstanding any other provisions of this Contract, once the Drilling Unit is under way from the drilling location, Operator shall be responsible for and hold harmless and indemnify Contractor for loss or damage to property, personal injury or death of any person which occurs thereafter as a result of the condition of the well or the location and Contractor shall be relieved of such liability.

911. Indemnity Obligation

- (a) The parties intend and agree that the phrase "be responsible for and hold harmless and indemnify" in Paragraphs 605, 606, 805 and 901 through 910 hereof means that the indemnifying party shall release, indemnify, hold harmless and defend (including payment of reasonable attorney's fees and costs of litigation) the indemnified party from and against any and all claims, demands, causes of action, damages, judgments and awards of any kind or character, without limit and without regard to the cause or causes thereof, including claims, liabilities, demands, and causes of action arising out of operation of, or in connection with, any vessel or vessels (including the Drilling Unit), including ingress and egress to the drilling location, and loading and unloading of personnel and cargo, and also including preexisting conditions, defect or ruin of premises or equipment (whether such conditions, defect or ruin be patent or latent), the unseaworthiness of any vessel or vessels (including the Drilling Unit), breach of representation or warranty (express or implied), breach of duty (whether statutory, contractual or otherwise), strict liability, any theory of tort, breach of contract, fault, regulatory or statutory liability, products liability, the negligence of any degree or character (including without limitation sole, joint or concurrent, active, passive or gross negligence) of any person or persons, including such negligence of the party seeking the benefit of a release, indemnity or assumption of liability, or any other theory of legal liability.
- (b) An indemnifying party's obligations contained in this Contract shall extend to the indemnified party and shall inure to the benefit of such party, its Affiliated Companies, and their co-owners, co-venturers, co-lessees, farmers, farmees, and joint owners, and the officers, directors, stockholders, partners, managers,

November 2007

representatives, employees, consultants, agents, servants and insurers of each, and to actions against the Drilling Unit, its legal and beneficial owners, whether in rem or in personam.

- (c) Except as otherwise provided herein, the terms and provisions of Paragraphs 605, 606, 805 and 901 through 910 shall have no application to claims or causes of action asserted against Operator or Contractor which arise solely by reason of any agreement of indemnity with a person or entity not a party hereto. Except as otherwise provided herein, nothing contained herein shall confer any rights upon any third party beneficiary.

912. General Intent

The parties recognize that the performance of well drilling, workover and associated activities such as those to be performed under this Contract have resulted in bodily injury, death, damage or loss of property, well loss or damage, pollution, loss of well control, reservoir damage, consequential damage and other losses and liabilities. It is the intention of the parties hereto that the provisions of this Article IX and Paragraphs 605, 606 and 605 shall exclusively govern the allocation of risks and liabilities of said parties without regard to cause (as more particularly specified in Paragraph 911), it being acknowledged that the compensation payable to Contractor as specified herein has been based upon the express understanding that risks and liabilities shall be determined in accordance with the provisions of this Contract

ARTICLE X - INSURANCE

1001. Insurance

Contractor shall carry and maintain, or cause to be carried and maintained, insurance coverages of the type and in the amounts set forth in Appendix E, covering only those liabilities specifically assumed by Contractor under this Contract.

All references in this Contract to "insurance" of Contractor shall mean such insurance as set forth in Appendix E. Contractor shall have the right to self-insure any or all of that portion of insurance relating to loss or damage to Contractor's Items.

Operator shall carry and maintain, or cause to be carried and maintained, the insurance coverages of the types and amounts set forth in Appendix F, covering only those liabilities specifically assumed by Operator under this Contract

All references in this Contract to "insurance" of Operator shall mean such insurance as set forth in Appendix F. Operator shall have the right to self-insure any or all of that portion of insurance relating to loss or damage to Operator's Items.

1002. Certificates

Each party will furnish the other, on request, certificates indicating that the required insurance is in full force and effect and that the same shall not be canceled or materially and adversely changed without ten (10) days prior written notice to the other party.

1003. Subrogation

For liabilities assumed hereunder by Contractor, its insurance shall be endorsed to provide that the underwriters waive their right of subrogation against Operator, its Affiliated Companies and their co-owners, co-venturers, co-lessees, farmers, farmees, and joint owners and the officers, directors, stockholders, partners, managers, representatives, employees, consultants, agents, servants and insurers of each. Operator will, as well, cause its insurer to waive subrogation against Contractor and Contractor's Affiliated Companies and their co-owners, and the officers, directors, stockholders, partners, managers, representatives, employees, consultants, agents, servants and insurers of each for liabilities it assumes.

1004. Additional Insured

Contractor shall name Operator as additional insured, where permitted, under its policies of insurance, but only with respect to and to the extent of the liabilities specifically assumed by Contractor under this Contract. Operator shall name Contractor as additional insured, where permitted, under its policies of insurance, but only with respect to and to the extent of the liabilities specifically assumed by Operator under this Contract

ARTICLE XI - SUBLETTING AND ASSIGNMENT

1101. Subcontracts

Either party may employ other contractors to perform any of the operations or services to be provided or performed by it

1102. Assignment

Neither party may assign this Contract other than to an Affiliated Company without the prior written consent of the other, and prompt notice of any such intent to assign shall be given to the other party. In the event of such assignment, the assigning party shall remain liable to the other party as a guarantor of the performance by the assignee of the terms of this Contract. If any assignment is made that increases Contractor's financial burden, Contractor's compensation shall be adjusted to give effect to any increase in Contractor's operating costs or taxes.

ARTICLE XII - NOTICES1201. Notices

Notices, reports and other communications required or permitted by this Contract to be given or sent by one party to the other shall be delivered by hand, mailed, digitally transmitted or telecopied to the address as specified in Appendix A. Either party may by notice to the other party change its address. Notices shall be effective upon receipt

ARTICLE XIII - GENERAL1301. Confidential Information

Upon written request of Operator, all information relating to the well obtained by Contractor in the conduct of operations hereunder shall be held confidential by Contractor who will use the same degree of care it uses in safeguarding its own confidential information.

1302. Attorney's Fees

If this Contract is placed in the hands of an attorney for collection of any sums due hereunder, or suit is brought on same, or sums due hereunder are collected through bankruptcy or arbitration proceedings, then the prevailing party shall be entitled to recover reasonable attorney's fees and costs of litigation.

1303. Force Majeure

Except as otherwise provided in this Paragraph 1303 and without prejudice to the risk of loss, release and indemnity obligations under this Contract, each party to this Contract shall be excused from complying with the terms of this Contract, except for the payment of monies when due, if and for so long as such compliance is hindered or prevented by riots, strikes, wars (declared or undeclared), insurrection, rebellions, piracy, terrorist acts, civil disturbances, dispositions or order of governmental authority, whether such authority be actual or assumed, epidemics, pandemic, acts of God (except, however, adverse sea or weather conditions including loop, eddy and other adverse currents), inability to obtain equipment, supplies, fuel or necessary labor, or by any act or cause (other than financial distress or inability to pay debts when due) which is reasonably beyond the control of such party, such cause being herein sometimes called "Force Majeure." Neither Operator nor Contractor shall be required against its will to adjust any labor or similar disputes except in accordance with applicable law. In the event that either party hereto is rendered unable, wholly or in part, by any of these causes to carry out its obligation under this Contract, such party shall give notice and details of Force Majeure in writing to the other party as promptly as possible after its occurrence. In such cases, the obligations of the party giving the notice shall be suspended during the continuance of any inability so caused except that Operator shall be obliged to pay to Contractor the Force Majeure Rate provided for in Paragraph 707.

1304. Right to Audit

For a period of two years from termination of the Contract, Contractor shall keep proper books, records and accounts of operations hereunder and shall permit Operator at all reasonable times to inspect the portions thereof related to any variation of the rates under Paragraph 709 or charges for reimbursable items.

1305. Compliance with Laws

Each party hereto agrees to comply with all laws, rules and regulations of any national, federal, state, provincial or local government authority which are now or may become applicable to that party's operations covered by or arising out of the performance of this Contract. In the event any provision of this Contract is inconsistent with or contrary to any applicable national, federal, state, provincial or local law, rule or regulation, said provision shall be deemed to be modified to the extent required to comply with said law, rule or regulation, and as so modified said provision and this Contract shall continue in full force and effect. Without prejudice to Article IX, if any act or omission by Contractor in response to an instruction of Operator's Personnel violates any such law, Operator shall be responsible for and hold harmless and indemnify Contractor for any consequences thereof.

Notwithstanding any provision in this Contract to the contrary, the parties agree that the failure by one party, solely on account of conflict of laws, to comply with applicable laws directly affecting the work or performance of such party's obligations under this Contract shall not constitute a breach of this Contract. Notwithstanding any provision in this Contract to the contrary, Operator agrees that Contractor, in undertaking the work or performing Contractor's obligations under this Contract, shall not be obligated to engage in any act or omission to act, which is prohibited by or penalized under any laws, rules or regulations applicable to Contractor or its Affiliated Companies.

1306. Expropriation

In the event that any of Contractor's Items are actually or constructively taken over or taken from Contractor by a government or any other entity, including any governmental seizure, detainment, confiscation, nationalization or expropriation, or if the exportation of Contractor's Items is effectively prohibited at any time (collectively, "Expropriation"), on any basis under which Contractor is not compensated for the fair market value thereof in U.S. Dollars, Operator will reimburse Contractor in an amount equal to the fair market value of such equipment in U.S. Dollars, less amounts recovered by Contractor under applicable insurance policies, if any, and less the U.S. Dollar equivalent of the amounts, if any, received by Contractor from such government body and convertible to U.S. Dollars or from any other source as compensation for such Expropriation. In

November 2007

addition Operator will reimburse Contractor for all other direct costs and expenses reasonably incurred as a result of such Expropriation.

In the event that a partial or full Expropriation renders Contractor unable to proceed with operations under this Contract, Operator will have the option of declaring that an Expropriation has occurred, in which event the date of Expropriation will be the date of Operator's delivery to Contractor of a written notice of Expropriation at which time the day rates payable under this Contract will cease.

Operator will pay Contractor the above computed amount within thirty (30) days of the date of such Expropriation. Contractor will pay to Operator any moneys received with respect to such Expropriation which Contractor receives and for which Operator has not already received credit after payments made by Operator to Contractor under this Paragraph 1306.

1307. Compliance with Export Controls and Trade Embargoes

In connection with the work to be performed under this Contract, each party shall comply at all times with all applicable trade embargo and export control laws, rules and regulations applicable to such party and its Affiliated Companies and shall not export or re-export any goods, software or technology (including, without limitation, technical data), directly or indirectly, without first obtaining all written consents, permits, or authorizations and completing such formalities as may be required by any such laws, rules or regulations. Each party shall assist the other party in applying for such consents, permits or authorizations and in completing such formalities if so requested. Each party shall provide to the other party upon request copies or other written evidence of such consents, permits or authorizations and such other information regarding export control classifications as may reasonably be requested. Each party represents that it has in place appropriate screening procedures to ensure compliance with such laws, rules and regulations and shall apply those procedures in connection with the work to be performed under this Contract. Each party agrees to keep records of its export and re-export related activities for a minimum of five years or such period as is required from time to time by all relevant laws, whichever is the greater. Each party shall make such records available to a duly authorized representative of the other party upon reasonable request for inspection and copying.

1308. Waivers

It is fully understood and agreed that none of the requirements of this Contract shall be considered as waived by either party unless the same is done in writing, and then only by the persons executing this Contract, or other duly authorized agent or representative of the party.

1309. Entire Agreement

This Contract constitutes the full understanding of the parties, and a complete and exclusive statement of the terms of their agreement, and shall exclusively control and govern all work performed hereunder. All representations, offers, and undertakings of the parties made prior to the effective date hereof, whether oral or in writing, are merged herein, and no other contracts, agreements or work orders, executed prior to the execution of this Contract, shall in any way modify, amend, alter or change any of the terms or conditions set out herein.

1310. Enurement

This Contract shall enure to the benefit of and be binding upon the successors and assigns of the parties.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED THIS CONTRACT ON THE DAY AND YEAR FIRST ABOVE WRITTEN.

OPERATOR: _____

BY: _____

TITLE: _____

CONTRACTOR: _____

BY: _____

TITLE: _____

November 2007

APPENDIX A

Attached to and incorporated as a part of that certain Contract dated. _____

Paragraph

Number:

101 (f) Operating Area: _____ +

101 (g) Operating Base: _____

110 Courts: _____

202 Duration: _____

203 (b) Termination: _____

203 (b) & (Date or Number of Wells) _____

705 (c) Demobilization Location: _____

204 Option Term: _____

Option Notice: _____ days after spud of prior well

Deadline for Mutual Agreement: _____ days after notice of exercise of option

503 Maximum Water Depth: _____

Minimum Water Depth: _____

Maximum Well Depth: _____

601 Handling Charge: _____ %

607 Contractor Taxes: _____

702 Mobilization Fee: U.S. \$ _____

703 Demobilization Fee: U.S. \$ _____

704 Operating Rate: U.S. \$ _____ m per day

705 Standby Rate: U.S. \$ _____ m per day

706 Repair Rate: U.S. \$ _____ m per day

Repair Time at Prior Applicable Rate: Surface Equipment: _____ per occurrence

Subsea Equipment: _____ per occurrence

707 Force Majeure Rate: U.S. \$ _____ per day

November 2007

Telecopier:

Attention:

802 Interest Rate on Late Payments: _____ per annum

803 Address for Payment:

Acct No.

1201 Address for Notices:
Operator:

Telecopier:

Attention:

Contractor:

Telecopier:

Attention:

Special Provisions:

November 2007

APPENDIX B**DRILLING UNIT AND EQUIPMENT TO BE PROVIDED BY CONTRACTOR****I. Drilling Unit Description****II. Equipment Inventory**

November 2007

APPENDIX C**PERSONNEL TO BE PROVIDED BY CONTRACTOR**

<u>Classification</u>	<u>Number on Board</u>	<u>Total Number</u>	<u>Work Schedule</u>
-----------------------	------------------------	---------------------	----------------------

APPENDIX D

CHECKLIST OF CONTRACTOR'S AND OPERATOR'S OBLIGATIONS

	Category
Furnished by Contractor, paid by Contractor	1
Furnished by Contractor, paid by Operator, plus handling charge	2
Furnished by Contractor, paid by Operator, no handling charge	3
Furnished by Operator, paid by Operator	4
1. Contractor's Items as set forth in Appendix B.	1
2. Except as otherwise specified, maintenance and repair, including repair parts, of Contractor's Items.	1
3. Maintenance and repair, including repair parts, of Operator's Items except as provided in Paragraph 403.	4
4. All charges relative to acquisition, shipping and transportation (except charges as provided in Items 61, 62, 64, 65, 66, 70 and 73) of all Contractor's Items required as replacements or spare parts.	1
5. Contractor's Personnel including replacement, subsistence, insurance, wages, benefits, and all other costs related thereto, except for local taxes pursuant to Paragraph 607 and for increases pursuant to Paragraph 709.	1
6. Extra personnel in excess of the complement of personnel set forth in Appendix C when requested in writing by Operator.	3
7. Overtime beyond normal work schedule for Contractor's Personnel when requested in writing by Operator.	3
8. Required licenses, permits, certificates of financial responsibility and clearances to enter upon and depart from drilling location, pursuant to Paragraph 605.	4
9. Surveying service and marker buoys to mark drilling location.	4
10. Sea floor surveys required by Contractor's Marine Surveyor.	4
11. Sea bottom coring services at the drilling location if required by Contractor.	4
12. Fuel, oil, greases, lubricants and hydraulic fluid for Contractor's Items and Operator's Items.	
a. Fuel;	4
b. Oil, greases, lubricants and hydraulic fluid.	3
13. Water for drilling, washdown and cementing and excess potable water, if required.	4
14. Drilling fluid and additives including lost circulation material.	4
15. Mud logging services.	4
16. Normal welding services required on Operator's Items to the extent available from Contractor's Personnel.	1
17. Welding materials used on Operator's Items.	2
18. Pneumatic hoses between supply vessels and Drilling Unit for unloading fuel, water, bulk cement and mud materials including repair and replacement of same:	
a. Initial hoses;	1
b. All replacements.	2
19. Mooring system between supply vessels and Drilling Unit including repair and replacement:	

November 2007

a. Initial;	1
b. All replacements.	2
20. Pre-slung cargo and pre-slung cargo baskets for use in transporting Contractor's Items to and from supply vessels.	1
21. Pre-slung cargo and pre-slung cargo baskets for use in transporting Operator's Items to and from supply vessels.	4
22. Towing service for all Drilling Unit moves, as approved by Contractor's insurance underwriters.	4
23. Tow lines and bollards.	4
24. Anchor setting and retrieving with marine vessels including anchor handling crews, if required.	4
25. Additional anchors and buoy lines, if required, including all repairs and replacement	3
26. Inspection of Contractor's drill pipe, drill collars and other in-hole equipment according to API standards before operations commence under this Contract, if required.	1
27. Inspection of Contractor's drill pipe, drill collars and other in-hole equipment according to API standards after operations commence under this Contract at reasonable intervals requested by Operator.	4
28. Drill pipe casing protectors (one per joint inside conductor or surface casing) on Contractor's drill pipe.	1
a. All additional rubbers or replacements for rubbers installed.	2
29. Drill pipe casing protectors on other drill pipe furnished by Operator, if required by Operator.	4
30. Kelly saver sub rubbers, and replacements, for kellys furnished by Contractor.	1
31. Drill pipe wipers.	1
32. Fishing tools other than provided by Contractor as set forth in Appendix B.	4
33. Repair and/or replacement parts for Contractor furnished fishing tools.	3
34. Drilling bits, stabilizers, hole openers, reamers, under-reamers, well scrapers, drilling bumper subs, drilling safety joints, hydraulic drilling jars, and other special in-hole equipment, including replacement parts and repairs for same.	4
35. Directional surveying equipment and service.	4
36. Deflection drilling tools and service.	4
37. Drill pipe, drill collars and handling tools other than those specified in Appendix B.	4
38. Blowout prevention equipment other than as listed in Appendix B.	4
39. Wellhead equipment and supplies.	4
40. Tubular goods, hangers, packers and accessories.	4
41. Casing shoes, float collars, baskets, centralizers, scratchers, scrapers, baffles and other casing accessories.	4
42. Casing tools as provided in Appendix B.	1
a. All repairs and replacements, if used.	3
43. Tubing tools, including slips, elevators, power tongs (or jaws for Contractor's power tongs), wrenches, and tubing pipe wiper.	4
44. Swabbing equipment, including lubricator, swab valve, swabs, oil savers, sinker bars, rope sockets and jars, if required (except sand line).	4

(International Offshore Daywork Drilling Contract - Appendix D - Page 2)

November 2007

45.	Swab rubbers and oil saver rubbers.	4
46.	Core barrels and handling tools.	4
47.	Core heads and core catchers.	4
48.	Wireline logging unit, maintenance of unit and logging services.	4
49.	Wireline formation testing and sidewall sampling equipment and services.	4
50.	Drill stem test equipment and services.	4
51.	Gun and perforating services.	4
52.	Cement and cementing services.	4
53.	Cementing unit, if specified in Appendix B.	1
NOTE: If Operator uses the services of a cementing service company other than the owner of the cementing unit, any charges imposed upon Contractor by the owner of the cementing unit as consequence thereof shall be for Operator's account		
54.	Repair and maintenance of Contractor furnished cementing unit.	3
55.	Labor to install servicing equipment by Operator aboard the Drilling Unit and for later removal, if required, including, but not limited to, cementing unit, wireline logging unit, mud logging unit, diving equipment and well testing system.	4
56.	Supplies and materials to install Operator's Items.	4
57.	Well testing system complete with separators, heaters, gas vents, metering, piping and valves, oil and/or gas burner, necessary booms, piping igniters, fabrication and installation.	4
58.	Test tanks for well fluid.	4
59.	Administrative center including offices, office furniture, equipment and supplies for Contractor's Personnel, warehousing and storage yard at Operating Base for Contractor's Items, if required.	1
60.	Administrative center including offices, office furniture, equipment and supplies for Operator's Personnel, warehousing and storage yard facilities for Operator's Items.	4
61.	Port facilities and dockside area in vicinity of Operating Base for loading and unloading Contractor's and Operator's Items on and off supply vessels.	4
62.	Transportation for Contractor's Items and Personnel:	
a.	Routine transportation from point of origin to Operating Base;	1
b.	Routine transportation from Operating Base to and return from dockside and/or heliport;	4
c.	Routine transportation from one Operating Base to another;	4
d.	Temporary lodging, if required, and transportation from Operating Base to and return from dockside and/or heliport and between Operating Bases during evacuation due to weather or other safety reasons;	3
e.	Emergency transportation for both Operator and Contractor, as required.	4
63.	Transportation for Operator's Items and Personnel to dockside at Operating Base or point of departure and return.	4
64.	Dockside labor and equipment at Operating Base to load and unload Contractor's and Operator's Items from or to land transportation and from or to supply vessels.	4
65.	Marine transportation for Contractor's and Operator's Items and Personnel from dockside to Drilling Unit and return with supply vessels supplied by Operator:	4

November 2007

a. Crew boats to transport personnel of Operator and Contractor; if required;	4
b. Standby boat, if required.	4
66. Storage space at dock site for Contractor's Items.	4
67. Storage space at dock site and Operating Base for Operator's Items.	4
68. Onshore transportation for Contractor's shorebased personnel.	1
69. Onshore transportation for Operator's shorebased personnel.	4
70. Duties fees, licenses, pilotage fees, wharfage fees, harbor fees and costs or similar charges including any sales taxes or clearing agent or brokerage fees relating to Contractor's Items and replacements or spare parts.	3
71. Duties, fees, licenses, pilotage fees, wharfage fees, harbor fees and costs or similar charges including any sales taxes or clearing agent or brokerage fees relating to Operator's Items and replacements or spare parts.	4
72. Communication system from Drilling Unit to supply vessel and supply vessel to Operator's Operating Base office or direct to Operating Base, including permits and licenses:	4
a. Communication system from Drilling Unit to Contractor's office or shore base, including permits and licenses;	1
b. Communication system operators.	4
73. All helicopter transportation as required including medical evacuation.	4
a. Non-directional beacon for helicopter operations.	4
74. Helicopter refueling system aboard Drilling Unit including helicopter fuel tanks, fuel tank stand, fuel pump filters, hoses and grounding systems.	4
75. Helicopter fuel and lubricants.	4
76. Special or additional helicopter safety equipment aboard Drilling Unit.	4
77. Diver services as required.	4
78. Meals and quarters for all of Contractor's Personnel and up to and including _____ Operator's Personnel.	1
79. Meals and quarters for Operator's Personnel in excess of _____ per day to be charged at \$ _____ per meal and \$ _____ per bed.	3
80. Waste storage, removal and disposal, including any required registration and permits.	4
81. Insurance as provided in Appendix E.	1
82. Insurance as provided in Appendix F.	4
83. Maintenance and repair including repair parts:	
a. Of Contractor's surface equipment except as provided in Paragraphs 605 and 901;	1
b. Rubber goods in Contractor's BOP's;	3
c. Of Contractor's subsurface equipment as provided in Paragraphs 605 and 901;	3
d. Of Contractor's mooring equipment including pendant lines.	3
84. Extra labor (in excess of supply vessel's personnel) required aboard supply vessels when alongside Drilling Unit to unload or load Contractor's and/or Operator's Items.	4
85. Anchor piles, if required, and placement of same.	4

November 2007

86.	Subsea equipment:	
	a. Wellhead equipment;	4
	b. Wellhead connector from BOP stack to wellhead as specified in Appendix B;	1
	c. Subsea running tools for wellheads, if required;	4
	d. Contractor's surface or subsea blowout preventer system as described in Appendix B;	1
	e. Wellhead temporary guidebase, if required;	4
	f. Wellhead guide post structure, if required;	4
	g. Jetting tools for jetting in conductor casing, if required;	4
	h. Guide arms and bushings for drilling conductor hole and running conductor casing, if required;	4
	i. Repair and/or replacement for items (a), (c), (e), (f), (g) and (h).	4
87.	Screens for shale shakers up to and including _____ mesh.	1
	a. Screens for shale shakers above _____ mesh.	3
88.	All screens for mud cleaners.	3
89.	Weather forecast services, if required.	4
90.	Conductor drive hammer and accessories, if applicable, including repairs and/or replacement.	4
91.	Personal protective equipment for Contractor's Personnel when using or handling corrosive or hazardous materials.	3
92.	Any PVT equipment or other monitoring devices other than specified in Appendix B.	4
93.	Corporate registration for Contractor (if required).	3

APPENDIX E

CONTRACTOR'S INSURANCE

I. Workers' Compensation and Employer's Liability

- A. Workers' Compensation insurance (or the equivalent for the Operating Area) to comply fully with the provisions and applicable laws of the country or state in which the Contractor qualifies as an employer and in which operations hereunder are performed, including U.S. Longshore & Harbor Workers Act and Outer Continental Shelf Lands Act coverage, if applicable.
- B. Employer's Liability (or the equivalent for the Operating Area) with limits of:
 - Bodily Injury by Accident - \$1,000,000 each accident
 - Bodily Injury by Disease - \$1,000,000 policy limit
 - Bodily Injury by Disease - \$1,000,000 each employee
- C. Maritime Employer's Liability (or the equivalent for the Operating Area) including Jones Act and Death on the High Seas Act coverage and transportation, wages, maintenance and cure with limits of \$1,000,000 each person/\$1,000,000 each accident
- D. "In rem" endorsement
- E. Borrowed Servant/Alternate Employer endorsement.

II. Comprehensive General Liability Insurance

- A. Commercial General Liability, including coverage for premises/operations, independent contractor's protective liability, contractual liability and products/completed operations coverage and subject to a \$1,000,000 combined single limit of liability each occurrence for Bodily Injury and Property Damage.
- B. Charterer's Legal Liability.
- C. Deletion of watercraft exclusion as respects operations and contractual liability for watercraft exposure not covered by Protection and Indemnity policy.
- D. "In rem" endorsement

III. Automobile Liability Insurance

Standard comprehensive form including all owned, hired and non-owned vehicles with a \$1,000,000 combined single limit of liability each accident for bodily injury and/or property damage.

IV. Aircraft Liability

Aircraft liability including contractual liability covering all owned (if any), hired and non-owned aircraft (fixed wing and rotary) including passenger liability with a \$5,000,000 combined single limit of liability each accident for bodily injury and/or property damage.

V. Excess/Umbrella Liability Insurance

- A. Providing following form coverage for Employer's Liability, Maritime Employer's Liability, Commercial General Liability, Automobile Liability, Aircraft Liability, and Vessel Liabilities.
- B. Limit of Liability: \$ _____ combined single limit of liability each occurrence for bodily injury and/or property damage.

VI. Marine Insurance

- A. Hull and Machinery Insurance (including collision liability) shall be provided for the Drilling Unit owned or chartered by Contractor and utilized in the performance of this Contract in an amount equal to the declared value of the Drilling Unit, subject to a deductible determined by Contractor.
- B. Protection and Indemnity Insurance or equivalent comprehensive general liability insurance, with watercraft exclusion deleted, shall be provided with a combined single limit of U.S. \$ _____ per occurrence or the value of the Drilling Unit, whichever is greater.

VII. No Recourse of Premium

All policies of insurance shall be endorsed to delete any recourse of premium, club calls, assessments or advances against Operator; Operator's Affiliated Companies, partnerships, and limited liability companies, and its and all of their co-owners, partners, co-venturers, and joint owners.

Deductibles

Except as otherwise provided, deductibles shall be for the account of Contractor.

APPENDIX F**OPERATOR'S INSURANCE**

- I. Workers' Compensation and Employer's Liability
- A. Workers' Compensation insurance (or the equivalent for the Operating Area) to comply fully with the provisions and applicable laws of the country or state in which the Operator qualifies as an employer and in which operations hereunder are performed, including U.S. Longshore & Harbor Workers Act and Outer Continental Shelf Lands Act coverage, if applicable.
 - B. Employer's Liability (or the equivalent for the Operating Area) with limits of:

Bodily Injury by Accident	-	\$1,000,000 each accident
Bodily Injury by Disease	-	\$1,000,000 policy limit
Bodily Injury by Disease	-	\$1,000,000 each employee
 - C. Maritime Employer's Liability (or the equivalent for the Operating Area) including Jones Act and Death on the High Seas Act coverage and transportation, wages, maintenance and cure with limits of \$1,000,000 each person/\$1,000,000 each accident
 - D. "In rem" endorsement
 - E. Borrowed Servant/Alternate Employer endorsement
- II. Commercial General Liability Insurance
- A. Commercial General Liability, including coverage for premises/operations, independent contractor's protective liability; contractual liability and products/completed operations coverage and subject to a \$1,000,000 combined single limit of liability each occurrence for Bodily Injury and Property Damage.
 - B. Underground Resource/Equipment Coverage.
 - C. Charterer's Legal Liability.
 - D. Deletion of watercraft exclusion as respects operations and contractual liability for watercraft exposure not covered by Protection and Indemnity policy.
 - E. "In rem" endorsement.
- III. Automobile Liability Insurance
- Standard comprehensive form including all owned, hired and non-owned vehicles with a \$1,000,000 combined single limit of liability each accident for bodily injury and/or property damage.
- IV. Aircraft Liability
- Aircraft liability including contractual liability covering all owned (if any), hired and non-owned aircraft (fixed wing and rotary) including passenger liability with a \$5,000,000 combined single limit of liability each accident for bodily injury and/or property damage.
- V. Excess/Umbrella Liability Insurance
1. Providing following form coverage for Employer's Liability, Maritime Employer's Liability, Commercial General Liability, Automobile Liability, Aircraft Liability, and Vessel Liabilities.
 2. Limit of Liability: \$ _____ combined single limit of liability each occurrence for bodily injury and/or property damage.
- VI. "All Risk" Insurance
- "All Risk" Insurance, subject to a nominal deductible, covering physical loss or damage (including wreck/debris removal) to all Operator's Items and other property of Operator.
- VII. Operator's Extra Expense Insurance
- Operator's Extra Expense Insurance in the amount of not less than U.S. \$ _____ combined single limit per occurrence to cover any and all sums which Operator and/or Contractor may be obligated to incur as expenses and/or liabilities which may be incurred on account of bringing under control an oil or gas well which is out of control or extinguishing an oil or gas well fire, redrilling or repair of loss or damage to an oil or gas well, seepage and pollution, cleanup and contamination arising from operations under this Contract
- VIII. No Recourse of Premium
- All policies of insurance shall be endorsed to delete any recourse of premium, club calls, assessments or advances

November 2007

against Contractor and its Affiliated Companies.

IX. Deductibles

~~Except as otherwise provided~~ deductibles shall be for the account of Operator.

X. Financial Responsibility

~~In the event applicable~~ law requires Operator to meet or exceed certain financial requirements, Operator shall provide Contractor with all related certificates or approvals issued by the government.

XI. Scope

~~The above~~ specified amounts and types of insurance coverage shall not be deemed to constitute, or be construed as, a limitation on Operator's liability under the Contract.

APPENDIX C - CAODC/CAPP Master Daywork Contract



FORM C3
05-01



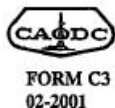
CAPP Approved

AGREEMENT

CAPP CAODC Master Daywork Contract

May 2001

Updated 2004 (Exhibit A)



The Canadian Association of Petroleum Producers (CAPP) represents 130 companies that explore for, develop and produce natural gas, natural gas liquids, crude oil, oil sands, and elemental sulphur throughout Canada. CAPP member companies produce more than 95 per cent of Canada's natural gas and crude oil. CAPP also has 150 associate members that provide a wide range of services that support the upstream crude oil and natural gas industry. Together, these members and associate members are an important part of a \$120-billion-a-year national industry that affects the livelihoods of more than half a million Canadians.



Disclaimer

This publication was prepared for the Canadian Association of Petroleum Producers (CAPP) by Canadian Association of Oilwell Drilling Contractors (CAODC). While it is believed that the information contained herein is reliable under the conditions and subject to the limitations set out, CAPP and CAODC do not guarantee its accuracy. The use of this report or any information contained will be at the user's sole risk, regardless of any fault or negligence of CAPP, CAODC or its co-funders.

2100, 350 – 7 Avenue S.W.
Calgary, Alberta
Canada T2P 3N9
Tel (403) 267-1100
Fax (403) 261-4622

403, 235 Water Street
St. John's, Newfoundland and Labrador
Canada A1C 1B6
Tel (709) 724-4200
Fax (709) 724-4225

www.capp.ca communication@capp.ca

FORM C3
05-01

CAPP
CANADIAN ASSOCIATION
OF PETROLEUM PRODUCERS

CONTRACT NUMBER	
CONTRACTOR	OPERATOR

MASTER DAYWORK CONTRACT

THIS MASTER DAYWORK CONTRACT MADE BETWEEN:

CONTRACTOR

and

OPERATOR

(hereinafter called "Contractor")

(hereinafter called "Operator")

WHEREAS:

Contractor and Operator desire to enter into this Master Daywork Contract to provide for the drilling of Wells from time to time in accordance with the terms and conditions set out herein;

NOW THEREFORE THIS AGREEMENT WITNESSES THAT in consideration of the mutual covenants and conditions set out herein, Contractor and Operator agree with each other as follows:

ARTICLE I DEFINITIONS

1.1 In this Master Daywork Contract:

"Affiliate" means, in relation to any person, any other person directly or indirectly controlling, controlled by or under direct or indirect common control with such person and, for the purpose of this definition, a person shall be deemed to control another person if such person possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of such other person, whether through the ownership of voting securities, by contract or otherwise;

"Area Drilling Program" means an agreement hereunder by which Contractor has undertaken to provide drilling services to Operator at Drilling Sites located within an area specified in the applicable Program Specification Sheet;

"Contingent Well" means a Well contemplated by Contractor and Operator at the time of entering into an Area Drilling Program as being included in the Area Drilling Program, the actual drilling of which is contingent upon a subsequent determination by Operator that the Well should be drilled, and which Contractor agrees, at the request of Operator, to drill as part of the Area Drilling Program;

"Contractor's Downhole Equipment" means, in respect of a Drilling Site, all equipment, materials or supplies owned or leased by Contractor and furnished by Contractor for the Drilling Site in accordance with Section 3.1 and the applicable Program Specification Sheet, when such equipment, materials or supplies are located below ground surface level down hole in the Well;

"Contractor's Equipment" means Contractor's Surface Equipment and Contractor's Downhole Equipment;

"Contractor's Group" means Contractor, its subcontractors, its and their Affiliates and the shareholders, officers, directors, employees, agents, consultants, servants, and invitees of each of them;

"Contractor's Surface Equipment" means, in respect of a Drilling Site, all equipment, materials or supplies owned or leased by Contractor and furnished by Contractor for the Drilling Site in accordance with Section 3.1 and the applicable Program Specification Sheet, used or intended to be used at or above the ground surface level and equipment, materials or supplies used or intended to be used below the ground surface level, when such equipment, materials or supplies are located at or above ground surface level;

"Drilling Program" means a Single Well Program, an Area Drilling Program or a Term Drilling Program entered into by Contractor and Operator from time to time in accordance with the terms of this Master Daywork Contract;

"Drilling Site" means the location at which a Well is to be drilled, is being drilled or has been drilled under a Drilling Program;

"Master Daywork Contract" means this document and includes Exhibit "A" attached hereto;

"Operator's Equipment" means, in respect of a Drilling Site, all equipment, materials or supplies owned or leased by Operator and furnished by Operator for the Drilling Site in accordance with Section 3.2 and the applicable Program Specification Sheet, whether such equipment, materials or supplies are located at, above or below ground surface level;

"Operator's Group" means Operator, its co-venturers, joint venturers, partners, co-lessors, its and their Affiliates and the shareholders, officers, directors, employees, agents, consultants, servants, and invitees of each of them;

"Program Specification Sheet" means a specification sheet prepared from time to time with reference to a Drilling Program hereunder, substantially in the form of Exhibit "A" to this Master Daywork Contract and including any attachments made thereto by mutual agreement of Contractor and Operator relating to the Drilling Program, executed by Contractor and Operator and attached hereto;

"Single Well Program" means an agreement hereunder by which Contractor has undertaken to provide drilling services to Operator for the drilling of a single Well at a Drilling Site, as specified in the applicable Program Specification Sheet;

"Specified Area Well" means, in respect of an Area Drilling Program, the Well or Wells that Contractor and Operator have specifically identified and agreed to drill in the applicable Program Specification Sheet;

"Term Drilling Program" means an agreement hereunder by which Contractor has agreed to provide drilling services to Operator at Drilling Sites to be identified by Operator for a term that is specified in the applicable Program Specification Sheet; and,

"Well" means an oil, natural gas, oil and natural gas, geothermal, injection, disposal or relief well to be drilled, in the course of being drilled or that has been drilled at a Drilling Site, as specified in a Program Specification Sheet.

ARTICLE II COMMITMENT PROCEDURE

2.1 Contractor and Operator may agree from time to time to undertake:

- Single Well Program;
- an Area Drilling Program; or,
- a Term Drilling Program;

by executing a Program Specification Sheet applicable to such Drilling Program and attaching the executed Program Specification Sheet to this Master Daywork Contract. The Program Specification Sheet, as governed by this Master Daywork Contract, shall constitute a single and separate agreement in regard to the Drilling Program specified therein.

2.2 Either Contractor or Operator may use Exhibit "A" to prepare and submit a bid to the other in respect of a proposed Drilling Program by dating and executing the bid with requisite terms in the form of Exhibit "A" and submitting it to the other ("Bid Document"). The party submitting the Bid Document may indicate a date thereon after which the bid expires and can no longer be accepted by the other party. The party receiving the Bid Document may accept the other party's bid prior to any expiry date by executing the Bid Document and returning it forthwith to the other party. The Bid Document, as executed by Contractor and Operator, shall be a Program Specification Sheet in regard to the Drilling Program described therein and shall be attached to this Master Daywork Contract.

2.3 For any period during which no Program Specification Sheet is in effect, this Master Daywork Contract shall remain in force, unless terminated pursuant to Section 17.1, and shall be effective for any subsequent Drilling Program at such time as a Program Specification Sheet for the Drilling Program is executed by Contractor and Operator and attached to this Master Daywork Contract.

2.4 At or prior to the time at which Contractor commences to spud the final Specified Area Well to be drilled under an Area Drilling Program, Operator may propose to Contractor, by notice in writing, that Contractor thereafter undertake the drilling of a Contingent Well or a number of Contingent Wells, not to exceed the number of Contingent Wells specified in the applicable Program Specification Sheet ("Contingent Well Proposal"). A Contingent Well Proposal shall specify the Drilling Site of each proposed Contingent Well and shall be deemed to incorporate the terms of the Program Specification Sheet applicable to the Area Drilling Program, applied mutatis



mutandis. If Contractor concludes in good faith that, by using reasonable commercial efforts, it is able to undertake the drilling of some or all of the Contingent Wells proposed by Operator, Contractor shall, within five (5) business days of receiving the Contingent Well Proposal, advise Operator by notice in writing of the Wells specified in the Contingent Well Proposal that it is able to drill and, subject to the terms and conditions of this Master Daywork Contract and the applicable Program Specification Sheet, Contractor shall drill such Wells.

ARTICLE III PROVISION OF EQUIPMENT, MATERIALS, SUPPLIES, SERVICES AND LABOUR

- 3.1 Contractor agrees, subject to the other terms and conditions of this Master Daywork Contract:
- to drill and complete each Well in a Drilling Program in accordance with the terms set out in the applicable Program Specification Sheet; and,
 - to provide, for each Drilling Program, the equipment, materials, supplies, services and labour to be provided by Contractor, as described in and in accordance with the specifications set out in the applicable Program Specification Sheet.
- 3.2 Operator agrees, subject to the other terms and conditions of this Master Daywork Contract:
- to stake the location of each Well of a Drilling Program at the applicable Drilling Site; and,
 - to provide, for each Well of a Drilling Program, the equipment, materials, supplies, services and labour specified to be provided by Operator, as described in and in accordance with the specifications set out in the applicable Program Specification Sheet.
- 3.3 A Drilling Program pursuant to this Master Daywork Contract is undertaken by the parties on a "Daywork" basis, which is to say, with respect to the equipment, materials, supplies, services and labour to be provided hereunder, that:
- Contractor shall be an independent contractor with respect to all matters pertaining to such Drilling Program and neither Contractor nor anyone in Contractor's Group shall be deemed for any purpose to be the employee, agent or representative of Operator in the performance of the work undertaken pursuant to the Agreement. Contractor shall perform its obligations pursuant to the Drilling Program under the direction and supervision of Operator.
 - Subject to the other terms of a Drilling Program, Operator shall pay Contractor for all equipment, materials, supplies, services and labour provided by Contractor in respect of each Well, as specified in the applicable Program Specification Sheet and shall compensate Contractor for services provided in respect of such Well at the daily rate or rates specified in the applicable Program Specification Sheet; and,
 - Certain of the risks and liabilities arising by reason of the operations and activities undertaken by the parties pursuant to a Drilling Program shall be allocated for each Drilling Site between Contractor and Operator in accordance with the provisions of Article X.
- 3.4 If, at Operator's request, Contractor purchases equipment, materials, supplies, and services, including tubular goods, that Operator is otherwise obligated to provide in respect of a particular Well in accordance with the applicable Program Specification Sheet, then, within thirty (30) days from the date of receipt by Operator of Contractor's invoice in respect of such purchases (which shall be supported with copies of all related third party invoices), Operator shall reimburse Contractor for Contractor's full cost of purchasing and shipping such equipment, materials, supplies, and services, plus applicable handling charges in the applicable Program Specification Sheet.
- 3.5 If equipment, materials, supplies, services or labour not identified in respect of a Well in the applicable Program Specification Sheet are required for drilling or completing the Well, the cost of such equipment, materials, supplies, services or labour and how and by whom such are to be provided shall be subject to further agreement of Operator and Contractor.
- 3.6 Operator shall secure for Contractor rights of ingress and egress to each Drilling Site. Operator shall advise Contractor of any limitations or restrictions affecting ingress and egress and Contractor shall abide by such limitations or restrictions. Should Contractor be denied free access to a Drilling Site for any reason not within the control of Contractor, Operator shall pay Contractor during the time of such denial at the day rate specified in the applicable Program Specification Sheet.
- 3.7 Contractor shall visually examine all casing, equipment, tools or other items furnished by Operator for each Drilling Site and if any apparent defects are found therein sufficient in Contractor's sole opinion to make the use of any such items unsuitable or unsafe, Contractor shall notify Operator of such apparent defect or defects and Operator shall, at its sole expense, replace the defective items.
- 3.8 Operator shall be responsible at Operator's cost and risk for the transportation, storage, treatment, disposal and/or recycling of any waste associated with the drilling or completion of operations at each Drilling Site, including, without limiting the foregoing, casing thread protectors drilling mud sacks, pipe dope pails and packaging for drilling fluid additives.
- 3.9 Operator shall at its cost and risk provide for the transportation, storage, treatment, disposal and/or recycling as required of any materials or products resulting from the drilling or completion of a Well or materials or products deemed to be dangerous or hazardous waste by any federal, provincial, municipal or territorial regulation, order or statute.
- 3.10 Operator shall be entitled to inspect and approve Contractor's performance of the work undertaken pursuant to a Drilling Program in order to ensure the satisfactory completion thereof. Unless otherwise agreed by Contractor and Operator in order to further the completion of a Drilling Program, Operator's Equipment shall, at the completion or abandonment of each Well, be returned to Operator in as good condition as when received by Contractor, ordinary wear and tear excepted.

ARTICLE IV CASING AND CEMENTING PROGRAM

- 4.1 The casing and cementing program for each Drilling Program shall be performed in accordance with the specifications set out in the applicable Program Specification Sheet. The exact setting depth of each string of casing, the amount of cement and the process to be used in setting, cementing and testing, shall be specified by Operator at the time of each casing setting. Operator may modify the casing program from the specifications referred to or specified in the applicable Program Specification Sheet, but any modification that materially increases Contractor's risks or costs of performing its obligations hereunder shall be made only by mutual agreement of Contractor and Operator.
- 4.2 Contractor agrees to keep thread protectors on the casing until the casing to be run into the hole is taken from the racks and to grease the threads with a suitable pipe lubricant as the casing is made up. Contractor further agrees to preserve all protectors and, after each Well is completed, to break down all surplus casing, put protectors on the casing as it is broken down, and return the casing to the pipe racks at the rig.

ARTICLE V DRILLING METHODS AND PRACTISES

- 5.1 Contractor agrees to perform its work pursuant to each Drilling Program with due care and diligence, in a good and workmanlike manner, in accordance with good drilling practices and in accordance with any additional written policies or guidelines that are agreed to by Contractor and Operator and attached to the applicable Program Specification Sheet.
- 5.2 Contractor agrees to maintain its well control equipment in good operating condition at all times, to test its blowout prevention units as prescribed in the applicable Program Specification Sheet and, subject to Sub-Section 10.3(c) herein, to use all reasonable means to control and prevent fire and blowouts.
- 5.3 Unless otherwise specified in the applicable Program Specification Sheet, during the drilling of each Well, Operator shall have the right to control the mud program, furnish all mud, conditioners/additives and chemicals and arrange for the purchase of all necessary mud conditioning materials. The drilling fluid shall be of a type and have characteristics acceptable to Operator and be maintained by Contractor in accordance with the specifications set out in the applicable Program Specification Sheet. No change or modification to such specifications having the effect of materially increasing Contractor's risks or costs in performing its obligations hereunder shall be made by Operator without the consent of Contractor. Both Contractor and Operator shall have the right to make any test of the drilling fluid that either considers necessary.
- 5.4 Contractor agrees to keep a drilling time log of each Well, noting the depth drilled, and to save and label samples of formations as Operator may request. Such log shall at all times be subject to inspection by Operator or its representative and, upon completion or abandonment of the Well, shall become the exclusive property of Operator.
- 5.5 Contractor agrees to conduct slope tests in order to verify the straight hole specifications as required in accordance with the applicable Program Specification Sheet at Operator's sole cost.

ARTICLE VI REPORTS TO BE FURNISHED BY CONTRACTOR

- 6.1 Contractor shall furnish Operator with a daily drilling report showing the current depth of each Well being drilled and such other data as may be required by Operator. Daily drilling report forms shall be furnished or specified by Operator and if such daily report forms are not available, the Daily Drilling Report Form approved by the Canadian Association of Oilwell Drilling Contractors shall be used.
- 6.2 Delivery tickets covering any materials or supplies furnished by Operator or by third parties for which Operator is obligated to reimburse Contractor must disclose the quantity and description of materials or supplies so furnished and shall be verified and visually checked by Contractor or its representative to confirm receipt thereof.

ARTICLE VII EARLY TERMINATION OF DRILLING AND CONTRACTOR COMPENSATION

- 7.1 Operator shall be entitled to stop the work being undertaken or to be undertaken in respect of a Well and to terminate such work at any time prior to the drilling of the Well reaching the depth specified in the Program Specification Sheet.



7.2 If work is terminated on any Well pursuant to Section 7.1 prior to spudding the Well, Operator shall pay Contractor, in addition to any amounts otherwise to be paid to Contractor pursuant to Article IX, an amount that is the sum of:

- (a) all expenses reasonably and necessarily incurred by Contractor prior to or by reason of the premature stoppage of the work on such Well, excluding normal drilling crew and supervision expenses;
- (b) fifteen percent (15%) of the amount of the expenses referred to in Sub-Section 7.2(a); and,
- (c) the standby with crew rate provided for in the applicable Program Specification Sheet for each day of the period, commencing on the date of the work stoppage, that is reasonably required by Contractor to dismantle its equipment.

7.3 If work is terminated on any Well pursuant to Section 7.1 after the spudding of the Well, Operator shall pay Contractor, in addition to any amounts otherwise to be paid to Contractor pursuant to Article IX, an amount that is the sum of:

- (a) all expenses reasonably and necessarily incurred by Contractor in respect of the Well prior to or by reason of the premature stoppage on such Well, excluding normal drilling crew and supervision expenses;
- (b) fifteen percent (15%) of the amount of the expenses referred to in Sub-Section 7.3(a); and,
- (c) the daywork rate provided for in the applicable Program Specification Sheet for each day of the period, commencing on the date of the work stoppage, that is reasonably required by Contractor to dismantle its equipment.

7.4 If the parties jointly determine that a total loss or destruction of a rig or a major breakdown with indefinite repair time has forced cessation of or prevents undertaking operations with respect to a Well being drilled or to be drilled hereunder, either party shall be entitled, upon written notice to the other, to terminate the work undertaken or to be undertaken in respect of such Well.

ARTICLE VIII TAKE-OVER BY OPERATOR

8.1 In the event of default by Contractor in performing its obligations under a Drilling Program, Operator shall give Contractor written notice ("Default Notice") specifying in detail the nature of the default ("Contractor Default"). Contractor shall have seven (7) days after receipt of the Default Notice in which to remedy the Contractor Default. If Contractor fails within the seven (7) day period to remedy the Contractor Default to Operator's satisfaction, Operator may take possession of any or all of Contractor's Equipment at a Drilling Site and, using Operator's own employees or employees of any other party, complete all or any portion of the work otherwise to be performed by Contractor pursuant to the Drilling Program in respect of the Well at the Drilling Site.

8.2 Notwithstanding Section 8.1, if at or after the time of a Contractor Default, before Operator has served any Default Notice in respect thereof or before the time to remedy the default specified in a Default Notice has expired, there exists or there is imminent risk of loss of control of a Well, blowout, fire or explosion, Operator shall have the right to immediately take over Contractor's Equipment and thereafter, in its sole judgment, continue, discontinue or abandon the work otherwise to be performed by Contractor in respect of the Well.

8.3 For each day of any period during which Operator takes over Contractor's Equipment pursuant to this Article VIII, Operator shall pay Contractor the day rate provided in the applicable Program Specification Sheet, after deduction of Operator's direct labour charges.

8.4 Operator shall, either at the completion or abandonment of a Well or in accordance with Section 8.6 hereof, whichever is sooner, return all Contractor's Equipment taken over pursuant to this Article VIII in as good condition as when taken over, normal wear and tear excepted.

8.5 If Contractor carries insurance on Contractor's Equipment, Contractor shall ensure that such insurance shall be continued in effect during any take-over pursuant to this Article VIII and Operator shall reimburse Contractor for the cost of such insurance during such take-over.

8.6 If, after Operator has taken over any or all of Contractor's Equipment pursuant to this Article VIII Contractor demonstrates to the satisfaction of Operator that Contractor can correct or remedy the matter specified in the applicable Default Notice, then Operator shall return Contractor's Equipment to Contractor and thereafter Contractor and Operator shall resume performance of the Drilling Program as if the Default Notice had not been given.

ARTICLE IX PAYMENTS TO CONTRACTOR

9.1 At the end of each month, Contractor shall submit, for each Drilling Site, an itemized invoice to Operator for all equipment, materials, supplies and labour furnished and services rendered pursuant to a Drilling Program during the month and shall include with such statement copies of all third party invoices in regard to the equipment, materials, supplies, labour or services covered by the statement together with all applicable receipts. Subject to Section 9.2, Operator shall pay Contractor the amount of each invoice within the period specified in the applicable Program Specification Sheet. All invoices shall be submitted to Operator at the address shown above or at any other address that Operator may specify to Contractor in writing for the purpose.

9.2 If Operator disputes any invoice or any part of an invoice in good faith, Operator shall give Contractor written notice of the details of the dispute within thirty (30) days of receiving the invoice ("Dispute Notice") and Operator shall be entitled to withhold payment of the portion of the invoiced amount relating to the dispute. Operator shall make timely payment of any undisputed portion of the invoiced amount. Except for any claim that Operator may make as a result of an audit undertaken pursuant to Article XIX, Operator expressly releases Contractor in respect of any claim not communicated to Contractor by Dispute Notice timely delivered and waives any claim it may have against Contractor in respect thereof.

9.3 Any sum not paid when due (including sums ultimately paid in respect of any dispute) shall bear interest at the rate specified in the applicable Program Specification Sheet.

ARTICLE X ALLOCATION OF RISK AND LIABILITY

10.1 Except as provided in Sections 10.2 and 10.5 and in Sub-Section 10.3(b)(i) in respect of a take-over by Operator pursuant to Article VIII, Contractor shall at all times assume all of the risk of and be solely liable for any damage to, loss of, or destruction of Contractor's Surface Equipment, regardless of the negligence or other fault of Operator's Group or howsoever arising and Contractor specifically releases Operator's Group in regard to any claims that Contractor may otherwise have in regard thereto.

10.2 Operator shall at all times assume all of the risk of and be solely liable for any loss of, damage to or destruction of Contractor's Surface Equipment:

- (a) that occurs during any period in which Operator has taken over operations pursuant to Article VIII;
- (b) caused by exposure to corrosive, destructive or abrasive elements that enter into the drilling fluids from subsurface formations or the use of corrosive, destructive, or abrasive additives in the drilling fluid or air drilling or hole deviation; and,
- (c) caused by Operator intentionally firing a Well in order to gain control of any blowout or wild well, except in circumstances where Operator has intentionally fired the Well:

- (i) in good faith and acting reasonably to assure the safety of on-site personnel or other persons or to prevent the occurrence of environmental damage; or,
 - (ii) when required to do so by a regulatory authority of competent authority;
- regardless of the negligence or other fault of Contractor's Group or howsoever arising, and Operator shall defend and indemnify Contractor's Group from and against any and all actions, claims, losses, costs, damages and expenses resulting therefrom.

10.3 Operator shall at all times assume all of the risk of and be solely liable for:

- (a) any loss of, damage to or destruction of:
 - (i) except as provided in Section 10.4, Contractor's Downhole Equipment;
 - (ii) Operator's Equipment; and,
 - (iii) the hole, reservoir or any underground formation, including, without limitation, any loss of, damage to or destruction of downhole casing and any loss, damage or destruction occurring by reason of the failure of Operator's Equipment during the running and setting of casing, as a result of a subsequent failure of the cement job or as a result of casing wear;

(b) any loss, liability or damage to any party arising:

- (i) during a take-over by Operator pursuant to Article VIII;
- (ii) in whole or in part from the use of the equipment, materials or supplies, including casing, provided by Operator; and,
- (iii) by reason of any cessation of operations pursuant to Section 7.1; and,

(c) the cost of gaining control of any blowout or wild well, including the cost of any removal of debris in relation thereto;

regardless of the negligence or other fault of Contractor's Group or howsoever arising, and Operator shall defend and indemnify Contractor's Group from and against any and all actions, claims, losses, costs, damages and expenses resulting therefrom and specifically releases Contractor's Group from any claims Operator may otherwise make in regard thereto.

10.4 Operator shall at all times during a Drilling Program assume all of the risk of and be solely liable for the cost of repairing and re-drilling a lost or damaged hole, including, without limitation, the cost of fishing operations, regardless of the negligence or other fault of Contractor's Group or howsoever arising, and Operator specifically releases Contractor's Group from any claims Operator may otherwise have in regard thereto; provided, however, that if, by reason of the negligent act or negligent omission or breach of Contractor, any of Contractor's Downhole Equipment is lost or lodged in a Well and Operator determines, in its sole discretion, to undertake fishing operations in order to dislodge or recover such Contractor's Downhole Equipment, Operator shall be relieved of liability to Contractor under the Drilling Program by the amount that is the lesser of:



- (a) the sum of:
- (i) Contractor's costs during the period of such fishing operations at the Drilling Site,
 - (ii) Contractor's daywork rate in effect for each day of such period; and,
 - (iii) the value of Contractor's loss, including the costs of repair, if any, arising by reason of such Contractor's Downhole Equipment being lost or lodged in the hole or damaged in the course of such fishing operations at a Drilling Site, as such value is determined pursuant to the applicable Program Specification Sheet; and,
 - (b) the amount agreed to by the parties and specified in the applicable Program Specification Sheet.

10.5 Except as otherwise noted in the applicable Program Specification Sheet in respect of a particular Drilling Site, Operator shall be responsible for preparing a sound location fully capable of supporting the Contractor's Equipment, including, in particular, any drilling rig of the type and size specified in the applicable Program Specification Sheet, together with an adequate conductor pipe program to ensure the integrity of the soil around the conductor pipe. Operator has superior knowledge of the Drilling Site and shall advise Contractor of any subsurface conditions including, but not limited to, mines, caverns, streams or springs that could result in the cratering or the shifting of the location surface during the course of drilling or completing the Well. If any such conditions are encountered and result in the cratering or shifting of the location surface, Operator shall be liable for and shall defend and indemnify Contractor's Group for all actions, claims, losses, costs, damages and expenses resulting from such conditions, including, without limitation, any loss of, damage to, or destruction of Contractor's Equipment and payment of any costs necessarily incurred to protect Contractor's Equipment and Contractor's personnel, regardless of the negligence or other fault of any member or members of Contractor's Group or howsoever arising.

10.6 Contractor shall be responsible at all times, other than during a take-over by Operator pursuant to Article VIII, for any actions, claims, costs, damages and expenses arising as a result of loss of life or bodily injury to the employees of Contractor's Group, regardless of the negligence or other fault of Operator's Group or howsoever arising and Contractor shall defend and indemnify Operator's Group from and against all actions, claims, costs, damages and expenses arising therefrom; provided that this Section 10.6 shall not apply to limit apportionment for associated costs under applicable workers' compensation legislation.

10.7 Operator shall be responsible at all times for any actions, claims, costs, damages and expenses arising as a result of loss of life or bodily injury to the employees of Operator's Group, regardless of the negligence or other fault of Contractor's Group or howsoever arising and Operator shall defend and indemnify Contractor's Group from and against all actions, claims, costs, damages and expenses arising therefrom; provided that this Section 10.7 shall not apply to limit apportionment for associated costs under applicable workers' compensation legislation.

10.8 Other than during a take-over by Operator pursuant to Article VIII, Contractor shall assume all the risk of and be solely liable for all actions, claims, losses, costs, damages and expenses of every kind and character arising from all pollution or contamination that may result from slush pit leakage or seepage, fire, blowout, cratering, or any other uncontrolled flow of oil, gas, water or other substances, as well as from the use or disposition of oil emulsion, water or oil based chemically treated drilling fluids, cuttings or caving and lost circulation materials or fluids, disposal, storage or treatment of any waste associated with drilling and completion operations, or items of equipment wholly in the possession and control of Operator and directly associated with Contractor's Equipment, regardless of the negligence or other fault of any member or members of Operator's Group or howsoever arising and Contractor shall defend and indemnify Operator's Group from and against all such actions, claims, losses, costs, damages and expenses; provided that this Section 10.8 shall not apply during a take-over by Operator pursuant to Article VIII nor in respect of any fuel spill that occurs when such fuel is being hauled by a member or members of Operator's Group.

10.9 Operator shall assume all the risk of and be solely liable for all actions, claims, losses, costs, damages and expenses of every kind and character arising from all pollution or contamination not referred to in Section 10.8 that occurs during the performance of a Drilling Program including, but not limited to, pollution or contamination that may result from slush pit leakage or seepage, fire, blowout, cratering, or any other uncontrolled flow of oil, gas, water or other substances, as well as from the use or disposition of oil emulsion, water or oil based chemically treated drilling fluids, cuttings or caving and lost circulation materials or fluids, disposal, storage or treatment of any waste associated with drilling and completion operations, or items of equipment wholly in the possession and control of Operator and directly associated with Contractor's Equipment, regardless of the negligence or other fault of any member or members of Contractor's Group or howsoever arising and Operator shall defend and indemnify Contractor's Group from and against all such actions, claims, losses, costs, damages and expenses.

10.10 Except as specifically provided in this Article X, Contractor shall:

- (a) be liable to Operator for such actions, claims, losses, costs, damages and expenses which Operator may suffer, sustain, pay or incur; and,
- (b) defend and indemnify Operator's Group against all actions, claims, losses, costs, damages and expenses brought against Operator's Group or which Operator's Group may suffer, sustain, pay or incur,

as a result of the negligent or wilful acts or negligent or wilful omissions of Contractor arising in connection with the work contemplated by a Drilling Program.

10.11 Except as specifically provided in this Article X, Operator shall:

- (a) be liable to Contractor for such actions, claims, losses, costs, damages and expenses which Contractor may suffer, sustain, pay or incur; and,
- (b) defend and indemnify Contractor's Group against all actions, claims, losses, costs, damages and expenses brought against Contractor's Group or which Contractor's Group may suffer, sustain, pay or incur,

as a result of the negligent or wilful acts or negligent or wilful omissions of Operator arising in connection with the work contemplated by a Drilling Program.

10.12 Each party ("Indemnified Party") shall, in a timely manner, advise the other party by written notice, with particulars, of any matter in respect of which, pursuant to the provisions of this Article X, the Indemnified Party claims indemnity or requires the other party to defend. Any reimbursement required to be made by one party to the other by reason of this Article X shall be made promptly in the manner specified in the applicable Program Specification Sheet.

10.13 For greater clarity, Contractor and Operator acknowledge and agree that:

- (a) the purpose of this Article X is to allocate contractually between Contractor and Operator certain of the risks, responsibilities, and potential losses or liabilities associated with the operations and activities involved in drilling a Well under a Drilling Program; and,
- (b) such allocation shall prevail in the place and stead of any other allocation of risks, responsibilities, or potential losses or liabilities that might be made on the basis of the negligence or other fault of either party or howsoever arising or any other theory of legal liability and notwithstanding the breach or alleged breach by either party of any provision of the Drilling Program not included in this Article X.

10.14 Notwithstanding any other provision of a Drilling Program, under no circumstances shall either party be liable to the other, by reason of the Drilling Program or otherwise, for indirect or consequential damages suffered by the other, including, without limitation, indirect or consequential damages involving loss of profits, loss of business or indirect economic loss.

ARTICLE XI INSURANCE

11.1 At all times during a Drilling Program, Contractor shall carry insurance of types and in minimum amounts as follows:

- (a) Comprehensive General Liability insurance having a limit of Two Million Dollars (\$2,000,000) inclusive, per occurrence, for bodily injury, death and property damage, or having such greater limit as may be specified in the applicable Program Specification Sheet;
- (b) Employer's Liability insurance having a limit of One Million Dollars (\$1,000,000) inclusive, per occurrence, for bodily injury, death and property damage, or having such greater limit as may be specified in the applicable Program Specification Sheet;
- (c) Automobile Liability insurance having a limit of One Million Dollars (\$1,000,000) inclusive, per occurrence, for bodily injury, death and property damage, or having such greater limit as may be specified in the applicable Program Specification Sheet;
- (d) Workers' Compensation insurance covering all Contractor's employees working on the operations and activities governed by the Drilling Program that complies with provincial, territorial or federal laws and regulations applicable to the Drilling Program; and,
- (e) any other insurance that may be specified in respect of a Drilling Program in the applicable Program Specification Sheet.

11.2 All insurance required pursuant to Section 11.1 shall be carried by insurers acceptable to Operator.

11.3 Contractor shall not be a self-insurer in respect of any one or more of the risks for which coverage is required herein unless Contractor has first obtained the written consent of Operator, signed by a representative of Operator authorized to provide such consent.

11.4 Either party shall provide to the other party, on written request by the other party, written evidence of its insurance policies that relate to any of the work or operations being performed or undertaken hereunder and, if charged to the other party, receipts in respect of the premiums thereon.

11.5 In respect of the risks or liabilities assumed by Operator pursuant to a Drilling Program, Operator shall ensure that, to the extent Operator obtains policies of insurance in respect of such risks and liabilities, such policies of insurance, to the extent possible:

- (a) shall be for the benefit of both parties and shall specify Contractor's Group as additional insureds; and,
- (b) are endorsed to provide that the insurers waive all rights, by subrogation or otherwise, against Contractor's Group.

11.6 In respect of the risks or liabilities assumed by Contractor pursuant to a Drilling Program, Contractor shall ensure that, to the extent Contractor obtains policies of insurance in respect of such risks and liabilities, such policies of insurance, to the extent possible:

- (a) shall be for the benefit of both parties and shall specify Operator's Group as additional insureds; and,
- (b) are endorsed to provide that the insurers waive all rights, by subrogation or otherwise, against Operator's Group.

ARTICLE XII ASSESSMENTS, LIENS AND THIRD PARTY CHARGES

12.1 Contractor agrees to pay all taxes, assessments, fees and charges levied or assessed on Contractor in connection with or incidental to the performance of a Drilling Program, unless otherwise identified in the Drilling Program as the responsibility of Operator, including any statutory deductions on the wages of Contractor's employees for employment insurance, old age security benefits or income tax and shall require the same undertaking from its subcontractors.

12.2 Contractor agrees to allow no lien or charge to be fixed upon any Well or land or lease on which such Well is located as a result of default by Contractor in payment



of any bona fide third party claims and Contractor shall indemnify and save Operator harmless from and against all such liens, and charges. If Contractor fails or refuses to pay any third party claims incurred by Contractor in connection with the drilling of a Well, unless Contractor has a bona fide reason for so doing, then Operator shall have the right to pay any such claims out of any money due or to become due to Contractor hereunder. No assignment by Contractor of the payment due Contractor hereunder shall have any force or effect until all such bona fide claims shall have been completely discharged.

12.3 Operator may require Contractor to furnish proof by statutory declaration that there are no unsatisfied claims for equipment, materials, supplies, services and labour before making payment to Contractor as required in a Drilling Program.

12.4 Operator may withhold that part of the payment due hereunder to Contractor as may be required by, and to be dealt with as specified in, the mechanic's or builder's lien legislation in force where a Well is located.

12.5 For the purpose of any claim Contractor may have against Operator for failing to pay amounts outstanding in respect of a Drilling Program, Operator acknowledges and agrees that:

(a) the Drilling Program entitles Contractor to register, pursuant to applicable legislation, a lien or liens against the interests of Operator's Group in any parcel of land on which work has been performed by Contractor to the extent that there are amounts owing to Contractor for services provided under the Drilling Program in respect of that parcel of land; and,

(b) the period within which Contractor may file such lien or liens shall commence on the last day on which Contractor has performed work under the Drilling Program, including, if applicable, any work performed on Contingent Wells that have been or are being drilled under an Area Drilling Program; provided that in no event shall any claim be made in respect of a single Drilling Site under a Drilling Program more than two (2) years after the work was performed on such Drilling Site.

ARTICLE XIII LAWS, RULES AND REGULATION

13.1 Contractor and Operator each agree to comply with all laws, rules and regulations, federal, provincial, municipal and territorial, which are or may be applicable during the performance of a Drilling Program.

ARTICLE XIV FORCE MAJEURE

14.1 For the purposes of this Article XIV, "force majeure" means any occurrence beyond the reasonable control of the party claiming suspension of an obligation hereunder which such party was unable to prevent or provide against by the exercise of reasonable diligence at a reasonable cost and includes, without limiting the generality of the foregoing, an act of God, war, revolution, insurrection, blockage, riot, strike, lockout or other industrial disturbance, fire, lightning, unusually severe weather, storms, floods, explosion, accident, shortage of labour or materials or government restraint, action, delay or inaction.

14.2 If any party is prevented by force majeure from fulfilling any obligations hereunder, the obligations of the party, insofar only as its obligations are affected by the force majeure, shall be suspended while the force majeure continues to prevent the performance of such obligations and for the time thereafter as that party may reasonably require to commence to fulfill such obligation. A party prevented from fulfilling any obligation by force majeure shall promptly give the other parties notice of the force majeure and the affected obligations, including reasonably full particulars thereof.

14.3 The party claiming suspension of an obligation as aforesaid shall promptly remedy the cause and effect of the applicable force majeure, insofar as it is reasonably able to do so and such party shall promptly give the other party notice when the force majeure ceases to prevent the performance of the applicable obligation. However, the terms of settlement of any strike, lockout or other industrial disturbance shall be wholly in the discretion of such party, notwithstanding Section 14.1, and that party shall not be required to accede to the demands of its opponents in any strike, lockout or industrial disturbance solely to remedy promptly the force majeure thereby constituted.

14.4 Notwithstanding anything contained in this Article XIV, lack of finances shall not be considered force majeure, nor shall force majeure suspend any obligation for the payment of money due hereunder.

ARTICLE XV PATENTS AND LICENSES

15.1 Contractor represents and warrants that the use of all equipment furnished by Contractor in the performance of a Drilling Program does not infringe on any license or patent which has been issued or pending and Contractor agrees to defend and indemnify Operator's Group from and against any and all actions, claims, losses, costs, damages and expenses, of every kind and character arising from the breach of such representation and warranty.

ARTICLE XVI CONFIDENTIAL INFORMATION

16.1 All information obtained by Contractor in the conduct of drilling operations during a Drilling Program, including, but not limited to, depth, formations penetrated, the results of coring, testing, surveying, the running of casing and the running of abandonment plugs, shall be considered the Operator's confidential information and shall not be divulged by Contractor or its employees to any third party other than Operator's designated representative or used by Contractor for any other purpose.

ARTICLE XVII TERM

17.1 This Master Daywork Contract may be terminated by either party upon thirty (30) days written notice to the other party, but shall, in any event, continue until the completion or termination of any Drilling Program then in effect.

ARTICLE XVIII ENTIRE AGREEMENT, CONFLICTS

18.1 Each Drilling Program shall constitute the entire agreement between Operator and Contractor in connection with the subject matter hereof and shall supersede all prior agreements, arrangements, negotiations, representations or understandings by or between them, whether written or otherwise.

18.2 No amendment, to this Master Daywork Contract or to any Drilling Program made hereunder shall be effective or binding upon the parties hereto (except modifications requested by the Operator and subsequently confirmed in writing) unless it is set forth in writing and duly executed by each of the parties hereto.

18.3 If there is a conflict between the provisions of this Master Daywork Contract and any Program Specification Sheet or other documentation that may be attached hereto and made part of a Drilling Program, the provisions of this Master Daywork Contract shall have precedence over the terms of the Program Specification Sheet and such other documentation.

18.4 If any of the provisions of a Drilling Program are determined to be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

18.5 Recitals and headings used in this Master Daywork Contract are intended by the parties to assist in the reading of this Master Daywork Contract and are not to be used or construed for the purpose of interpreting any provision herein.

ARTICLE XIX AUDIT

19.1 Contractor shall retain all books, records, and accounts relating to the work performed by Contractor under any Drilling Program (hereinafter called the "Well Records") for a period of two (2) years after the completion of such work. Operator, by its duly authorized representative, shall have the right during the said two (2) year period to inspect and audit, at Operator's sole cost, the Well Records in Contractor's office during Contractor's regular office hours, upon giving reasonable written notice to Contractor. No claim based on a discrepancy disclosed by such an audit shall be made by Operator unless it is made in writing to Contractor on or before the thirtieth (30th) day after the said two (2) year period.



ARTICLE XX NOTICES

20.1 The address for Notices of each of the parties hereto shall be as follows:

Contractor:

Operator:

Fax _____

Fax _____

20.2 All notices, communications and statements (hereinafter called "Notices") required, permitted or contemplated hereunder shall be in writing, and shall be deemed to be sufficiently given and received if:

(a) personally served on the other party by delivery during the normal business hours of the recipient at the addresses set forth above (personally served Notices shall be deemed received by the addressee when actually delivered); or,

(b) by telefax (or by any other like method by which a written or recorded message may be sent) directed to the party on whom they are to be served at that party's fax number set forth above and such Notices so served shall be deemed to have been received by the addressee thereof when actually received by it if received within the normal working hours of a Business Day, or, if received outside the normal working hours of a Business Day, at the commencement of the next ensuing Business Day following transmission thereof.

20.3 Either of the parties hereto may from time to time change its address for service, and related particulars, herein by giving Notice to the other.

ARTICLE XXI ASSIGNMENTS

21.1 Neither party hereto may assign any of its rights or obligations hereunder without the written consent of the other party, such consent not to be unreasonably withheld.

ARTICLE XXII APPLICABLE LAW

22.1 This Master Daywork Contract, any Drilling Program entered into hereunder and any related documentation shall be interpreted, construed and enforced in accordance with the laws of the Province of Alberta. Any legal proceedings that may be taken by the parties in respect of this Master Daywork Contract, any Drilling Program entered into hereunder or such documentation shall be taken before the Court of Queen's Bench of Alberta and each of the parties specifically attorns to the jurisdiction thereof.

IN WITNESS WHEREOF, the parties hereto have signed this Master Daywork Contract by their duly authorized officers.

DATE signed by Operator: _____

WITNESS: (unless signed under seal)

Operator

By: _____

By: _____

DATE signed by Contractor: _____

WITNESS: (unless signed under seal)

Contractor

By: _____

By: _____

FORM C4
04-04

CONTRACT NUMBER	
CONTRACTOR	OPERATOR

EXHIBIT "A" TO A MASTER DAYWORK CONTRACT

DATED _____

BETWEEN _____, AS CONTRACTOR

AND

_____, AS OPERATOR

THIS IS PROGRAM SPECIFICATION SHEET # _____ attached to and made part of a Master Daywork Contract dated _____ between _____, as Contractor, and _____, as Operator.

SECTION I PROGRAM SPECIFICATION

1. Drilling Program to which this Program Specification Sheet applies (identify one of the following choices and fill in corresponding section below):

☐ SINGLE WELL PROGRAM ☐ AREA DRILLING PROGRAM ☐ TERM DRILLING PROGRAM

1.1 SINGLE WELL PROGRAM

NAME OF WELL: _____

DRILLING SITE: The Drilling Site of the Well is in the Province or Territory of _____ and located at (Land Description) _____.

COMMENCEMENT DATE: Contractor agrees to use all reasonable efforts to commence operations for the drilling of the Well by the _____ day of _____, 20____; or _____.

DEPTH: The Well shall be drilled to a depth of approximately _____ metres, or to the _____ formation, whichever is deeper, but Contractor shall not, in any event, be required hereunder to drill such Well below a maximum depth of _____ metres, unless Contractor and Operator otherwise agree in writing. Rates for drilling to any greater depth shall be negotiated by Contractor and Operator unless provided for in Section 7 hereof.

CASING AND CEMENTING PROGRAM: Subject to Section 4.1 of the Master Daywork Contract, the Casing and Cementing Program shall be as specified by Operator in Operator's Drilling Program, or as follows:

Minimum Hole Diameter (mm)	Casing OD (mm)	Approximate Setting Depth (m)	WOC Hours Cut Off	Drill Out

MUD CONTROL PROGRAM: Subject to Section 5.3 of the Master Daywork Contract, the Mud Control Program shall be as specified by Operator in Operator's Drilling Program, or as follows:

Depth Intervals (m)		Type Mud	Density (kg/m ³)	Viscosity (s/L)	Water Loss (cm ³)
From	To				

STRAIGHT HOLE SPECIFICATIONS: Straight Hole Specifications shall be as specified by Operator in Operator's Drilling Program, or as follows:

Well Depth (m)		Maximum Distance Between Surveys (m)	Maximum Deviation From Vertical (Degrees)	Maximum Change of Angle (or Overall Angle) Between Two Surveys (Degrees ⁹)
From	To			

The location of the well bore at _____ metres shall be _____.

* This rate of change shall not be limiting in case of directional drilling by Operator.

C4-04-04

Page 1 of 10
© 2004, CANADIAN ASSOCIATION OF OILWELL DRILLING CONTRACTORS

Initial _____



1.2 AREA DRILLING PROGRAM

The Area Drilling Program shall take place in the Province or Territory of _____ within the area identified as (Land Description) _____

NAME OF FIRST SPECIFIED AREA WELL: _____

Drilling Site: the Drilling Site of the first Specified Area Well is located at (Land Description) _____

NAME OF SECOND SPECIFIED AREA WELL: _____

Drilling Site: the Drilling Site of the second Specified Area Well is located at (Land Description) _____

NAME OF THIRD SPECIFIED AREA WELL: _____

Drilling Site: the Drilling Site of the third Specified Area Well is located at (Land Description) _____

NUMBER OF POSSIBLE CONTINGENT WELLS: Operator and Contractor contemplate that, depending upon the results of the drilling of the Specified Area Wells, a maximum of _____ Contingent Wells may be requested by Operator under this Area Drilling Program pursuant to Section 2.4 of the Master Daywork Contract.

COMMENCEMENT DATE: Contractor agrees to use all reasonable efforts to commence operations for the drilling of the First Specified Area Well by the _____ day of _____, 20____; or _____

DEPTH: Each Well within this Area Drilling Program shall be drilled to a depth of approximately _____ metres, or to the _____ formation, whichever is deeper, but Contractor shall not, in any event, be required hereunder to drill such Well below a maximum depth of _____ metres, unless Contractor and Operator otherwise agree in writing. Rates for drilling to any greater depth shall be negotiated by Contractor and Operator unless provided for in Section 7 hereof.

CASING AND CEMENTING PROGRAM: Subject to Section 4.1 of the Master Daywork Contract, the Casing and Cementing Program in respect of this Area Drilling Program shall be as specified by Operator in Operator's Drilling Program.

MUD CONTROL PROGRAM: Subject to Section 5.3 of the Master Daywork Contract, the Mud Control Program in respect of this Area Drilling Program shall be as specified by Operator for each Well in Operator's Drilling Program.

STRAIGHT HOLE SPECIFICATIONS: Straight Hole Specifications in respect of this Area Drilling Program shall be as specified by Operator for each Well in Operator's Drilling Program.

1.3 TERM DRILLING PROGRAM

TERM: This Term Drilling Program shall begin on the Commencement Date and shall extend for a period of _____ months (days) thereafter; provided that, if at the end of such period, Contractor is in the process of drilling a Well pursuant to this Term Drilling Program, this Term Drilling Program shall be extended until the Well is completed or the drilling of the Well is otherwise terminated pursuant to the Master Daywork Contract.

COMMENCEMENT DATE: Contractor agrees to use all reasonable efforts to commence operations for the drilling of the first Well by the _____ day of _____, 20____; or _____

DEPTH: Any Well to be drilled pursuant to this Term Drilling Program shall be drilled to a depth specified by Operator for such Well, but Contractor shall not, in any event, be required to drill any such Well below a maximum depth of _____ metres, unless Contractor and Operator otherwise agree in writing. Rates for drilling to any greater depth shall be negotiated by Contractor and Operator unless provided for in Section 7 hereof.

CASING AND CEMENTING PROGRAM: Subject to Section 4.1 of the Master Daywork Contract, the Casing and Cementing Program in respect of this Term Drilling Program shall be as specified by Operator in Operator's Drilling Program.

MUD CONTROL PROGRAM: Subject to Section 5.3 of the Master Daywork Contract, the Mud Control Program in respect of this Term Drilling Program shall be as specified by Operator for each Well in Operator's Drilling Program.

STRAIGHT HOLE SPECIFICATIONS: Straight Hole Specifications in respect of this Term Drilling Program shall be as specified by Operator for each Well in Operator's Drilling Program.



SECTION II

EQUIPMENT TO BE PROVIDED BY CONTRACTOR



2. Contractor shall provide the following equipment:
- 2.1 Contractor's Rig # _____, including attached inventory, or including the following:

Drawworks _____

Engines — number, make and model _____

Slush pump — make, model and size _____

Auxiliary pump and power _____

Derrick or mast — make, size and capacity _____

Substructure — height and capacity _____

Fuel storage capacity of _____ litres

Water storage capacity of _____ m³

Steel mud and circulating tanks of _____ m³

Drill pipe sizes, connection types and quantity _____

Drill collars — sizes, connection types and quantity _____

Present location of rig _____

Estimated availability of rig _____

- 2.2 Blowout Preventers, including attached inventory, or including the following:

Size	Rated W.P.	Make & Model	BOP Pressure Tests	
			Frequency	kPa
BOP Closing Units				
BOP Accumulator				

Contractor to supply a minimum Class _____ or as per Operator's attached specifications.
 Certified as per N.A.C.E. _____ yes _____ no

Date of last BOP shop test _____

- ### 2.3 Safety and Performance Summary:

(a)	Operations for the last 12 months:	Company	Rig Bid
Fatality (F)	= # Fatality		
Lost-Time Accident (LTA) Frequency	= $\frac{\text{Lost-Time Accidents} \times 200,000}{\text{Total Manhours Worked}}$		
Medical Treatment Only (MTO) Frequency	= $\frac{\text{Medical Treatment Only Cases} \times 200,000}{\text{Total Manhours Worked}}$		
Restricted Work Case (RWC) Frequency	= $\frac{\text{Restricted Work Cases} \times 200,000}{\text{Total Manhours Worked}}$		
LTA Severity Indicator	= $\frac{\# \text{ LTA Days}}{\# \text{ LTAs} \times 30}$		
RWC Severity Indicator	= $\frac{\# \text{ RWC Days}}{\# \text{ RWCs} \times 30}$		
Total Recordable Incident Frequency	= $\frac{F + \text{LTA} + \text{MTO} + \text{RWC} \times 200,000}{\text{Manhours}}$		



(b) Rig Safety Performance by Month:

Date rig last worked _____

List the number of LTAs, RWCs and MTOs by month for the last twelve month period for the rig bid.

Month	LTA	RWC	MTO

(c) Outline of Contractor's Safety Program and Policies:

Numbers of days rig has operated without a Recordable Incident _____

Proposed names and number of incident free days:

Rig Manager _____	_____ days
Driller #1 _____	_____ days
Driller #2 _____	_____ days
Driller #3 _____	_____ days
Driller #4 _____	_____ days

Indicate whether your company has:

	Yes	No
An accident investigation form	_____	_____
A policy to investigate accidents	_____	_____
A form for, and conducts, regular rig inspections	_____	_____
A new employee orientation program	_____	_____
Safety Supervisor (Name) _____	_____	_____
(Tel.) _____	_____	_____

If not full time, list other duties: _____

An active safety committee	_____	_____
Date of last meeting	_____	_____
Confined space / hot work permit policies	_____	_____

SECTION III

EQUIPMENT TO BE PROVIDED BY THE DESIGNATED PARTY

3. The equipment and instruments listed as the following numbered items shall include any transportation required for such items unless otherwise specified and shall be provided at the location and at the expense of the party hereto designated by an "X" in the appropriate column.

Item	To Be Provided By		N/A	At The Expense Of	
	Contractor	Operator		Contractor	Operator
3.1 Rig matting _____					
3.2 Rig anchors _____					
3.3 Slush pits or special steel tanks _____					
3.4 Water storage at location _____					
3.5 Bits _____					
3.6 Reamers, stabilizers and special drilling tools _____					
3.7 Shock sub: _____ Make/Model: _____					
3.8 Wellhead connections and all equipment to be installed in or on wellhead or on the premises for use in completion of the Well _____					
3.9 Crossover spool from casing head to BOPs _____					
3.10 Welding services for casing jobs and/or wellhead connection _____					
3.11 Casing bowl: size _____ kPa					
3.12 Casing, essentially as specified herein _____					
3.13 Casing shoes, floats, centralizers, scratchers _____					
3.14 Casing tools (as per casing program — conventional only) _____					
3.15 Power casing tongs for — surface casing _____					
— intermediate casing _____					
— long string _____					
3.16 Drill pipe protectors for kelly joint running inside of casing for use with normal strings of drill pipe _____					
3.17 Special strings of drill pipe and drill collars as follows: _____					



Item	To Be Provided By		N/A	At The Expense Of	
	Contractor	Operator		Contractor	Operator
3.18 Kelly joints, subs, elevators, slips and handling tools for use with special strings of drill pipe and drill collars _____					
3.19 Drill pipe protectors for kelly joints running inside of casing for use with above noted special strings of drill pipe _____					
3.20 Fishing tools and services _____					
3.21 Recording device _____ Make/Model: _____					
3.22 PVT equipment _____ Make/Model: _____					
3.23 Flowline monitor _____ Make/Model: _____					
3.24 Manifold hydraulic choke _____ Make/Model: _____					
3.25 Conventional drift indicator _____					
3.26 Steel mud and circulating tanks _____					
3.27 Boiler and normal winterization _____					
Special winterization of _____					
3.28 Mud servicing equipment _____					
(a) Desander _____ Make/Model: _____					
(b) Desilter _____ Make/Model: _____					
(c) Centrifuge _____ Make/Model: _____					
(d) Shale shaker _____ Make/Model: _____					
(e) Shale shaker screens _____					
(f) Special mud-treating equipment of _____					
(g) Normal storage for mud and chemicals _____					
3.29 Mud gas separator _____ Make/Model: _____					
3.30 BOP bleed-off manifold _____ size _____ kPa					
3.31 Special manifold equipment as follows _____					
3.32 Breathing and safety apparatus _____					
(a) Normal required by Workers' Compensation Board _____					
(b) Special breathing or safety equipment apparatus and supervision required because of hydrogen sulphide testing, hole conditions or well site remoteness _____					

SECTION IV CAMP AND CREW FACILITIES TO BE PROVIDED BY DESIGNATED PARTY

4. Camp and crew facilities and equipment required at the Drilling Site and all related expenses shall be provided by and shall be the responsibility of the party hereto designated by an "X" in the appropriate column.

Item	To Be Provided By		N/A	At The Expense Of	
	Contractor	Operator		Contractor	Operator
4.1 Camp: _____ Unit Camp (_____ men) which includes meals and lodging for up to _____ Operator personnel _____					
Camp transportation _____					
Mobilization _____					
De-mobilization _____					
Camp personnel transportation _____					
Transportation of groceries _____					
Separate light plant (if required) _____					
Potable water including cost of hauling _____					
Crew entertainment, satellite T.V. or movie rentals _____					
Lodging and meals for crews when camp is not operational _____					
Disposal of camp waste _____		X			X
Rig up & tear out _____					
Camp staff overtime _____					
4.2 Crew transportation by aircraft from _____					
4.3 Crew vehicle, if required _____					
Fuel _____					
4.4 First aid attendant and ambulance service _____					
4.5 Special safety clothing and/or equipment _____					
4.6 Additional Equipment _____					
(a) _____					
(b) _____					
(c) _____					
(d) _____					
(e) _____					



**SECTION V
MATERIALS AND SERVICES TO BE PROVIDED
BY THE DESIGNATED PARTY**



5. The materials, supplies, services and labour listed as the following numbered items include any transportation required for such items unless otherwise specified and shall be provided at the location and at the expense of the party hereto designated by an "X" in the appropriate column.

	Item	To Be Provided By		N/A	At The Expense Of	
		Contractor	Operator		Contractor	Operator
5.1	Provision for and maintenance of adequate roadway to and from location, rights of way including road tolls, highway crossing, cattle guards and gates					
5.2	Clearing and grading of location					
5.3	Well site restorations to include pits and sump					
	(a) Rathole and mousehole expense					
	(b) Conductor expense (*)					
	(c) Cellar, conductor hole, mousehole and rathole drilling including cost of and setting of conductor pipe to a maximum of \$					
	(*) Includes expense of drilling, materials, setting and cementing same.					
5.4	Transportation of Contractor's rig (for rates see Section 7.7 below):					
	(a) Special moving equipment for rig supplies or personnel if road becomes impassable by normal transportation means or vehicles					
	(b) Move in and rig up trucking					
	(c) Move out trucking					
	(d) Stack out trucking if move off required by Operator					
	(e) Inter-location trucking					
	(f) Contractor's labour to move and rig up					
	(g) Contractor's labour to tear out over well					
	(h) Contractor's labour to load out and stack out					
	(i) Contractor's labour for inter-location moves to tear out, move and rig up					
	(j) Leveling of rig — Prior to spud					
	Subsequent leveling of rig at Operator's expense					
	(k) Incremental crew labour due to adverse road and/or weather conditions					
5.5	Towing services on lease and/or access road including without limitation all chaining-up time, stuck time and towing time and all charges for additional trucks, vehicles and equipment required in respect of such towing services					
5.6	Fuel:					
	Rig					
	Camp					
	Boiler					
	Rental equipment					
	Camp propane					
	Other					
	Normal fuel storage					
	Additional fuel storage					
	The cost of fuel is included in the quoted rates based on \$ per litre of diesel fuel, F.O.B. location. Operator will reimburse Contractor for any additional fuel costs above \$ per litre, F.O.B. location.					
5.7	Water costs for rig including hauling up to \$ per day					
	Water costs for rig including hauling in excess of \$ per day					
	Water costs include all hauling costs. Contractor's portion of costs calculated from spud to release of rig. Access and purchase of water at Operator's expense. All water costs for lost circulation at Operator's expense					
5.8	Cement and cementing services for — surface casing					
	— intermediate casing					
	— long string					
5.9	Extra labour for casing jobs					
5.10	(a) Inspection services for Contractor's drill pipe prior to spud if required by Operator: metres drilled since last inspection					
	(b) Inspection services for Contractor's drill pipe after spud and/or at completion of Contract, if required					
	(c) Inspection services for Contractor's drill collars, subs, kelly, etc. prior to spud					
	(d) Inspection services for Contractor's drill collars, subs, kelly, etc. every days and/or at completion of Contract					
	(e) Transportation costs for repairs and replacement of drill pipe and drill collars					
	(f) Repairs to drill pipe					
	(g) Repairs to drill collars					
5.11	Crew subsistence allowance (including Rig Manager(s))					
5.12	Disposal of waste from drilling or completion operations		X			X
5.13	Disposal of Contractor rig waste only					
5.14	Special allowance(s) for oil based or invert mud					
5.15	Special inhibitors or chemicals for highly corrosive drilling fluids					
5.16	Provincial tax (as applicable on Contractor's capital equipment and supplies)					
5.17	Municipal well tax					



Item	To Be Provided By		N/A	At The Expense Of	
	Contractor	Operator		Contractor	Operator
5.18 Additional materials, supplies and/or services.					
(a) _____					
(b) _____					
(c) _____					
(d) _____					
(e) _____					

SECTION VI ADDITIONAL INSURANCE COVERAGE

6. Contractor agrees to carry insurance in respect of the Drilling Site specified herein, which shall be in addition to the minimum coverages and amounts specified in Article XI of the Master Daywork Contract, as follows:

- (a) Comprehensive General Liability insurance:
 Minimum coverage specified under Article XI of the Master Daywork Contract \$ 2,000,000.00
 Additional coverage agreed to herein \$ _____
 Total Coverage required \$ _____
- (b) Employer's Liability insurance:
 Minimum coverage specified under Article XI of the Master Daywork Contract \$ 1,000,000.00
 Additional coverage agreed to herein \$ _____
 Total Coverage required \$ _____
- (c) Automobile Liability insurance:
 Minimum coverage specified under Article XI of the Master Daywork Contract \$ 1,000,000.00
 Additional coverage agreed to herein \$ _____
 Total Coverage required \$ _____
- (d) Other insurance _____

SECTION VII COMPENSATION TO BE PAID TO CONTRACTOR BY OPERATOR

7. Operator shall pay Contractor compensation as follows:

- 7.1 For rig and crew

- (a) For all work performed with a full crew on a daywork basis, Contractor shall be paid a rate for each twenty-four (24) hour day as follows:

From	To	Move in, Rig Up, Tear Out, Load Out, Stack Out	With Drill Pipe	Without Drill Pipe	Using Operator's Pipe

For daywork comprising less than a twenty-four (24) hour day, Contractor shall be paid the proper fractional part of the amount specified for a twenty-four (24) hour day. The proper fractional part of the time shall be computed to the nearest one-quarter (1/4) hour. Drill pipe shall be considered in use not only when in actual use but also while it is being picked up or laid down. If Contractor furnishes special strings of drill pipe, drill collars and handling tools as provided for in _____ herein, the same shall be considered in use at all times when on location or until released by Operator. Work performed on a daywork basis shall commence:

- (i) in the case of a new Well where Contractor is required to drill a rathole or a mousehole, when the drilling of the rathole or a mousehole commences;
- (ii) in the case of a new Well where Contractor is not required to drill a rathole or a mousehole, when Contractor commences to spud the Well; and,
- (iii) in the case of a Well that involves re-entry into an existing well-bore, upon Contractor commencing installation of the first BOP component.
- (b) For standby time while waiting on orders or materials, services or other items to be furnished by Operator, the standby rate shall be \$ _____ per twenty-four (24) hour day with full crew or \$ _____ per twenty-four (24) hour day with no crew. Watchmen shall be charged at \$ _____/man/twenty-four (24) hour day plus Crew Subsistence Allowance. Other standby:
- (c) A full crew shall consist of _____ crews of _____ men per tour, each working _____ hours and _____ all under the supervision of a rig manager and a _____



- (d) If it becomes necessary to shut down Contractor's rig for repair of equipment for which Contractor is responsible hereunder while Contractor is performing work on a daywork basis, excluding routine rig servicing, Contractor shall be allowed compensation during such repairs at the applicable daywork rate commensurate with the stage of operations then in effect. The number of hours for which Contractor is to be compensated shall be limited as follows:

For any one repair job: _____ hours

Total hours in the month: _____

Total hours in the aggregate for the Well: _____

- (e) Extra labour at Operator's request is at Operator's expense.

- (f) Overtime charges for crew and supervisory labour for Statutory Holidays.

7.2 For the camp:

- (a) When in use _____ \$ _____/day
 (b) Standby _____ \$ _____/day
 (c) Separate light plant (including fuel) _____ \$ _____/day
 (d) Extra meal charges over and above _____ meals/day (as stated in Section 4) _____ \$ _____/meal
 (e) Extra lodging costs over and above _____ men/day (as stated in Section 4) _____ \$ _____/man
 (f) Rig up & tear out _____ \$ _____/day
 (g) Potable water including hauling _____ \$ _____
 (h) Other: _____ \$ _____
 (i) Other: _____ \$ _____

7.3 For crew subsistence allowance (including rig manager(s)):

- (a) With camp _____ \$ _____/man/day
 or \$ _____/day
 (b) Without camp _____ \$ _____/man/day
 or \$ _____/day

7.4 For special safety clothing and/or equipment _____ \$ _____

7.5 For mud gas separator _____ \$ _____

7.6 For boiler and special winterization:

- (a) When in use _____ \$ _____/hour
 or \$ _____/day
 (b) Standby _____ \$ _____/day
 (c) Special winterization _____ \$ _____
 (d) Other: _____ \$ _____/day

7.7 For transportation of contractor's rig (normal conditions):

- (a) Move in and rig up trucking costs _____ \$ _____
 (b) Move out trucking costs _____ \$ _____
 (c) Stack out trucking costs if move off required by Operator _____ \$ _____
 (d) Inter-location trucking costs _____ \$ _____
 (e) Contractor's labour costs to move and rig up ready to spud _____ \$ _____
 (f) Contractor's labour costs to tear out over well _____ \$ _____
 (g) Contractor's labour costs to load out and/or stack out _____ \$ _____
 (h) Contractor's labour costs for inter-location moves to tear out, move and rig up _____ \$ _____
 (i) Levelling of rig costs - prior to spud _____ \$ _____
 (j) Incremental crew labour costs due to adverse road and/or weather conditions _____ \$ _____

7.8 For special allowance for oil-based or invert mud:

- (a) Clothing allowance for crews and rig managers _____ \$ _____/man/day
 or \$ _____/day
 (b) Rig allowance _____ \$ _____/day
 (c) Steam cleaning/wash rig on Operator's location, including labour _____ \$ _____
 (d) Additional rig expense _____ \$ _____

7.9 For crew transportation and services:

- (a) Crew vehicle (including routine maintenance and insurance) _____ \$ _____/day
 (b) Other: _____ \$ _____

7.10 For loader (including routine maintenance and insurance) _____ \$ _____/day

Extra/Additional Operator _____ \$ _____/day

For Additional Insurance As Specified in Section 6	Rate Per Day From Commencement as Defined in Subsection 7.1 (a) to Completion
Comprehensive General Liability Insurance	\$ _____
Employer's Liability Insurance	\$ _____
Automobile Liability Insurance	\$ _____
Other Insurance	\$ _____

	Item	\$/day
(a)		
(b)		
(c)		
(d)		
(e)		
(f)		
(g)		
(h)		
(i)		
(j)		

Position	Regular Hourly Rate 8 Hour Tour \$	Overtime Hourly Rate 8 Hour Tour \$	Regular Hourly Rate 12 Hour Tour \$	Overtime Hourly Rate 12 Hour Tour \$
Driller				
Derrickhand				
Motorhand				
Floorhand				
Leasehand				

- (a) During the term of the Drilling Program, the rates set forth herein shall be revised to compensate Contractor for any escalation in its cost of labour and subsistence, supervision, catering and camp facilities, maintenance, fuel, insurance or transportation should such escalation be general throughout the drilling industry. The date of revision is to be the date of such escalation. The rates set forth herein shall also be revised to compensate Contractor for increased costs and/or reduction in profit as a result of municipal, provincial, federal or territorial taxes or other legislation which becomes effective after the date hereof.
- (b) The basis for payment to Contractor for equipment lost or damaged in the hole or for equipment lost or damaged in any other circumstances where Operator is liable or responsible for Contractor's equipment under or by reason of any provision of the Master Daywork Contract shall be _____ % of new replacement costs at the time of delivery, F.O.B. well site.
- (c) Should Contractor purchase for Operator at Operator's request any materials, supplies, services or equipment, including tubular goods, which Operator is obligated to furnish under the terms of this Drilling Program, Operator agrees to pay Contractor within thirty (30) days after date of receipt of Contractor's invoice in regard thereto the actual cost of such materials, supplies, services or equipment, plus a handling charge equal to _____ % of such cost.
- (d) Should either party claim reimbursement from the other party for any losses, costs, damages or expenses pursuant to the provisions of Article X of the Master Daywork Contract, the other party shall pay the amount claimed within thirty (30) days after the date of receipt of an invoice from the claiming party setting out the amounts and particulars of such losses, costs, damages or expenses.
- (e) The maximum amount for which Contractor may be liable under this Drilling Program pursuant to Section 10.4 of the Master Daywork Contract is \$_____.
- (f) Any sum not paid within _____ days after the date of receipt of the invoice shall bear interest at a rate of 18% per annum from such due date until paid.
- (g) Federal Goods and Services Tax will be invoiced to Operator at prescribed rate.

8. Attach separate page if required.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

APPENDIX D – Contract Model of a Major Operator

Contract Number: C-2770

CONTRACT NUMBER: C-2770

BETWEEN

EXPLORCo

AND

DRILLCo

for

**PROVISION OF JACK-UP DRILLING UNIT
AND DRILLING RIG SERVICES**

for

DRILLING PROGRAMME OFFSHORE NIGERIA

CONTENTS

Section

1. Definitions and Interpretation
2. Commencement, Duration and Term
3. Mobilisation and Demobilisation
4. Appointment of Contractor and Company Representative
5. Drilling Operations
6. Equipment, Supplies and Services
7. Personnel
8. General Responsibilities of the Contractor
9. General Responsibilities of the Company
10. Compensation
11. Invoicing and Payment
12. Customs, Duties and Taxes
13. Liabilities and Indemnities
14. Consequential Loss
15. Insurance
16. Force Majeure
17. Confidentiality
18. Intellectual Property Rights and Patent Infringement
19. Assignment and Subcontracting
20. Records and Audit
21. Termination and Amendment of Contract
22. Suspension of Day Rate
23. Notices
24. Co-venturers
25. Variation
26. Other Conditions
27. Compliance with Law
28. Permits and Licences
29. Independent Contractor
30. Waiver
31. Business Standards
32. Local Content
33. Governing Law
34. Survival

Contract Number: C-2770

- 35. Drilling Unit Security
- 36. Entire Agreement

Schedules

- 1. Drilling Unit Specification and Equipment List
 - a) Drilling Unit Description and Inventory
 - b) Rig Commissioning
 - c) Equipment and Operating Standards
- 2. Additional services and equipment to be provided by Contractor
- 3. Personnel, Equipment, Materials, Supplies and Services to be supplied by Company and/or Contractor
- 4. Contractor Personnel
- 5. Scope of Work and Drilling Sequence
- 6. Compensation
- 7. Health, Safety and Environment Policy
- 8. Medical and Catering Requirements
- 9. Procedure for offshore Helicopter Refuelling Systems and the Management of Offshore Helideck Operations
- 10. Drilling Unit and Equipment Repairs

Contract Number: C-2770

THIS CONTRACT is made effective the 8th day of October, 2013.

BETWEEN:

- (1) **EXPLORCo** a company incorporated and existing under the laws of the Federal Republic of Nigeria with its registered office and operational address at --- ("hereinafter referred to as Company, together with any permitted successors and assigns"); and
- (2) **DRILLCO.**, a Company organised and existing under the laws of Cayman Islands and having its registered office at ----- (hereinafter collectively referred to as "Contractor", together with any permitted successors and assigns)

WHEREAS:

Company wishes to engage Contractor to provide a Drilling Unit and personnel to drill offshore Nigeria ("Work") for a term drilling programme and Contractor is willing to accept such engagement on the following terms and conditions.

NOW THEREFORE IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

- 1.1. For purposes of this Contract, the following words shall have the meanings hereinafter ascribed to them:

"Affiliate"

means in relation to either Party a company or corporation:

- (i) that is, directly or indirectly, controlled by such Party; or
- (ii) that, directly or indirectly, controls such Party; or
- (iii) that is, directly or indirectly, controlled by a company or corporation that also, directly or indirectly, controls such Party.

For the purposes of this definition, "control" means having the right to exercise or cause the exercise of the vote of more than 50% of all of the voting shares of such company or corporation.

"API"

means the American Petroleum Institute.

"Applicable Law"

means all laws, statutes, judgements, statutory instruments, decrees, ordinances, regulations, directives (including but not limited to Employers' Liability, Workman's Compensation or similar statutory national insurance), decrees and rules of Nigeria or the government having or claiming jurisdiction thereof, of whatever form or title whether of the nation, state, province, district,

Contract Number: C-2770

	<p>prefecture, territory, governorate, municipality or other political subdivision which apply with respect to the Contractor in fulfilling its obligations under this Contract and/or the Drilling Operations and/or the Work, including any amendment, modification and/or re-enactment thereof, for the relevant time period.</p>
"Air Base"	<p>means the Company's air base at Port Harcourt and/or elsewhere as designated by Company.</p>
"Area of Operations"	<p>means offshore Nigeria or such other area as requested by Company and agreed to by Contractor within which the Drilling Operations are to be conducted.</p>
"Claims"	<p>means claims, liens, judgments, penalties, proceedings, awards, remedies, debts, liabilities, damages, demands, costs, losses, expenses (including without limitation legal costs and expenses) or causes of action, of whatever nature including, without limitation, those made or enjoyed by dependants, heirs, claimants, executors, administrators, successors, survivors or assigns.</p>
"Commencement Date"	<p>means the date and time when the following events have occurred: (i) Contractor has given Company written notification that the Drilling Unit is ready; (ii) Company has accepted the Drilling Unit in accordance with Section 6.2; and, (iii) the Drilling Unit is under tight tow one (1) nautical mile from the designated first well location.</p>
"Company Group"	<p>means the Company, its Co-Venturers, Company's other contractors and their respective subcontractors (of any tier), its and their respective Affiliates and its and their respective officers, directors, employees (including agency personnel and consultants) and invitees, but does not include any member of the Contractor Group."</p>
"Company Group Equipment"	<p>means all equipment, materials, tools, spare parts and other items owned, hired or otherwise in the possession or control of any member of the Company Group, but excludes those items provided by the Contractor and reimbursed by the Company as detailed in Schedule 3.</p>
"Company Group Personnel"	<p>means the directors, officers, employees, agents, consultants and invitees of the Company Group.</p>
"Company's Representative"	<p>means the representative(s) of the Company appointed pursuant to Section 4.</p>
"Completion Date"	<p>"Completion Date" means the date and time when Drilling Operations shall be deemed to have been completed under the Contract, being the date and time on which all of the Company Group Equipment has been off-loaded from the Drilling Unit (except as the Parties may otherwise</p>

Contract Number: C-2770

agree) and: (i) in the event that another operator has contracted the Drilling Unit in direct continuation of Company's Contract, the Drilling Unit is under tight tow one (1) nautical mile away from Company's final Well Location; or, ii) in the event that Contractor has not contracted the Drilling Unit with another operator in direct continuation of Company's Contract, or (iii) at Contractor's sole discretion, Contractor wishes to undertake scheduled or non-scheduled repairs/maintenance, Special Periodic Survey or other Classification Survey prior to the commencement of a contract with another operator, the Drilling Unit is safely jacked-up in a sheltered water location off Port Gentil, Gabon or an equivalent distant location nominated by Contractor. The Moving Rate shall apply during Demobilization with any required tow, anchor handling or supply vessels to be supplied by and at the cost of Company, together with the costs of fuel for such vessels and for the Drilling Unit.

"Contractor Group"

means the Contractor, its Subcontractors, its and their Affiliates, its and their respective, directors, officers, employees (including agency personnel and consultants) and invitees, and the Drilling Unit and the legal and beneficial owners thereof, but does not include any member of the Company Group.

"Contractor Group Equipment"

means the Drilling Unit and all equipment, materials, tools, spare parts and other items (including those specified in Schedules 1, 2, and 3) owned, hired or leased by Contractor for use in connection with the Contract.

"Contractor Group Personnel"

means the directors, officers, employees, agents, consultants and invitees of the Contractor Group. The Contractor Group Personnel shall include (but not be limited to) the personnel listed in Schedule 4.

"Contractor's Representative"

means the representative of the Contractor appointed pursuant to Section 4.

"Co-Venturers"

means any other entity, including but not limited to XXX, with whom the Company is or may be from time to time a party to a joint operating agreement, production sharing agreement, unitisation agreement, technical services agreement or similar agreement relating to the Area of Operations for which the work is being performed and the successors in interest of such Co-Venturer or the assignees of any interest of such Co-Venturer.

"Daily Drilling Report"

means the daily drilling report on the IADC standard form or in such other form as the Company may require pursuant to Section 5.6.

Contract Number: C-2770

“Demobilization Point”	means either (i) one (1) nautical mile from Company's final Well Location in the event that another operator has contracted the Drilling Unit in direct continuation of this Contract provided there is no requirement for the Drilling Unit to be exported outside Nigeria for any reason whatsoever or (ii) if Contractor has not contracted the Drilling Unit with another operator in direct continuation of this Contract or, at Contractor's sole discretion, Contractor wishes to undertake scheduled or non-scheduled repairs/maintenance, Special Periodic Survey or other Classification Survey prior to the commencement of a contract with another operator, the Drilling Unit is safely jacked-up in a sheltered water location off Port Gentil, Gabon or an equivalent distant location nominated by Contractor.
“Dollars”	means dollars of the United States of America.
“Drilling Operations”	means all drilling and ancillary operations which the Contractor is required to carry out to drill (and, as the case may be, complete, sidetrack, suspend and/or abandon) in strict conformity with the Drilling Programme and this Contract.
“Drilling Programme”	means the drilling programme(s) to be delivered by the Company to the Contractor pursuant to Section 5.2.
“Drilling Unit”	means the XXX drilling unit complete with all spare parts, ancillary equipment, tools, materials and services and as further specified in Schedule 1a (Equipment List) but excluding Company Group Equipment.
“Dry Tow Offload Location”	means dry tow vessel discharge point in Malabo, Equatorial Guinea, or as mutually agreed.
“Firm Term”	means the Operational Period between the Commencement Date and the Completion Date pursuant to the provisions of Section 2.2 and Section 2.3.
“Government”	means the government and governmental authorities having jurisdiction over the Area of Operations.
“HSE Policy”	means the health, safety and environmental policy comprising Schedule 7.
“IADC”	means the International Association of Drilling Contractors.
“Intellectual Property”	means any patent, copyright, proprietary right, trademark, know-how, process, invention, and any other form of discovery (whether or not patentable or in any other way registrable) made by any person or entity.
“Mobilisation Point”	means the shipyard in Singapore where the Drilling Unit is being reactivated and/or prepared for this Contract.

Contract Number: C-2770

“Operational Period”	means the period from the Commencement Date to the Completion Date or, if earlier, the date on which this Contract is terminated for any reason.
“Party” or “Parties”	means the Company and/or the Contractor as the context so requires.
“Subcontractors”	means those parties and their contractors of any tier to whom the Contractor has subcontracted any part of its obligations under this Contract.
“Supply Base”	means the Company’s supply base in Port Harcourt and/or elsewhere as mutually agreed by the Parties.
“Third Party”	means any person or entity which is not a member of the Contractor Group, Contractor Group Personnel, Company Group and/or the Company Group Personnel.
“Scheduled Earliest Mobilisation Date”	means March 1 st , 2014 which shall be the earliest date on which the Contractor is required to initiate mobilisation of the Drilling Unit from the Mobilization Point.
“Scheduled Latest Mobilization Date”	means June 15th 2014 which shall be the latest date on which the Contractor is required to initiate mobilisation of the Drilling Unit from the Mobilization Point.
“Variation”	means the addition to, the deduction from, or any other way of varying the Contract in accordance with Section 25.
“VAT”	means any taxes in the nature of value added tax, goods and services tax or sales tax.
"Well"	means a Well to be drilled, completed, side-tracked, tested, suspended, re-entered and/or abandoned in accordance with the Drilling Programme and/or directives of Company. A Well drilled hereunder which is re-spudded or sidetracked for any reason shall be deemed to be one well.
“Well Location”	means the location(s) of the Well.
“Working Day”	means a day on which the clearing banks are open for business in both London and Nigeria.

- 1.2. The Schedules referred to in this Contract form an integral part of this Contract. In the event of any conflict between a Schedule and the main body of this Contract, the latter shall prevail. In the event of any conflict between the Schedules, the order of precedence shall be: 1st- Schedule 7, 2nd- Schedule 6, 3rd – Schedule 1, 4th - Schedule 2, 5th- Schedule 3, 6th- Schedule 5, 7th- Schedule 4, 8th- Schedule 8 and 9th – Schedule 9.
- 1.3. The index and any headings used in this Contract are inserted for convenient reference only and shall be ignored in construing the meaning of any of the provisions of this Contract.

Contract Number: C-2770

- 1.4. Where the sense requires, words denoting the singular only shall also include the plural and vice versa. References to persons shall include any company, firm, partnership, joint venture, association, body corporate or individual. Reference to any gender shall include a reference to all other genders.
- 1.5. References to statutory provisions shall be construed as references to those provisions in effect at the date of this Contract, as respectively amended or re-enacted or as their application is modified by other provisions (whether before or after the date hereof) from time to time and shall include references to any provisions to which there are re-enactments (whether with or without modification).

2. COMMENCEMENT, DURATION AND TERM

- 2.1 This Contract will be effective on and from the date hereof and will, unless earlier terminated pursuant to Section 21, continue in force until the Completion Date.
- 2.2 The Firm Term of the Contract shall begin on the Commencement Date and except as set forth hereafter continue consecutively for a nine hundred and twelve (912) day firm period in accordance with the terms of the Contract to include the period required to demobilise the Drilling Unit and to off-load Company Group Equipment from the Drilling Unit.
- 2.3 Company shall have the right to extend the Firm Term in direct continuation by an additional two (2) terms of three hundred and sixty five (365) days each subject to the Parties agreement on applicable terms and conditions.

Company shall notify Contractor of its intent to extend the Firm Term by giving Contractor written notice on or before one hundred and twenty (120) days before the end of the Firm Term or each extension period.

Notwithstanding the Firm Term, the Parties agree that such Firm Term shall be extended, and any additional term as described above shall be extended to allow completion of the Work on the last Well commenced during the Firm Term or any additional term, if applicable, provided that Company may not, without Contractor's consent, which shall not be unreasonably denied, commence a new Well during the final thirty (30) days of the Firm Term, or additional term (if applicable) if such new Well is not expected (based on a reasonable P50 estimate) to be completed within sixty (60) days after the end of the Firm Term, or additional term (if applicable). Should Contractor withhold its consent to commencement of a new Well during the last thirty (30) days of the Firm Term, or additional term (if applicable), then the Contract will expire upon completion of the last Well completed prior to such proposed Well, but in no event more than thirty (30) days prior to the expiration of the Firm Term.

3. MOBILISATION AND DEMOBILISATION

3.1 Initial Mobilisation

- (a) Contractor shall be responsible for mobilisation of the Drilling Unit from the Mobilisation Point to the Dry Tow Offload Location, together with other Contractor Group Equipment and the Contractor Group Personnel. Company shall be responsible for providing tow vessels from the Dry Tow Offload Location to the first Well Location,

Contract Number: C-2770

- (b) Notwithstanding the foregoing provisions of this Section 3.1, the Company shall have no obligation:
 - (i) to accept the Drilling Unit prior to or on the Commencement Date in the event there is any outstanding deficiency which has been outlined in the Schedule 10 and is still not closed out unless otherwise mutually agreed; or
 - (ii) unless otherwise specified herein, to make any payments with respect to the Contractor's mobilisation of the Drilling Unit pursuant to the provisions of this Section 3.1 until the Commencement Date
- (c) Time required to obtain/renew temporary importation permit, and obtain any resulting importation, exportation and/or customs clearance ("TIP process") shall be payable as follows:
 - (i) If the TIP process occurs prior to the Commencement Date, it shall be payable at fifty percent (50%) of the Operating Rate up to a maximum of five (5) days from commencement of the TIP process. Thereafter, rate shall be zero. Company shall facilitate towing of the Drilling Unit as provided in Schedule 6.
 - (ii) If at anytime during the Firm Term of the Contract or any extensions thereof, the Drilling Unit is required by Applicable Law or orders of the corresponding Nigerian Government Authorities to leave the country, the TIP process shall be payable at fifty percent (50%) of the Operating Rate up to a maximum of twenty-one (21) days from commencement of the TIP process.

For purposes of this Section, Nigerian Government Authorities shall be defined as any ministry, body, department, agency or instrumentality, such as state-owned or state controlled company or statutory corporation thereof of the government of Nigeria.

In the event the TIP process lasts longer than sixty (60) days, the Company shall have the right to terminate the Contract without incurring any liability whatsoever or additional costs up to the date of termination for demobilization of the Drilling Unit.

- (d) Following the effective date of this Contract, the Contractor shall at regular intervals give notice to the Company of the estimated date of availability of the Drilling Unit.
- (e) The Party responsible for the supply of anchor handling and/or towing vessels and crews for the mobilisation of the Drilling Unit, other Contractor Group Equipment and the Contractor Group Personnel to the first Well Location and any subsequent Well Locations is specified in Schedule 3.
- (f) During the tow of the Drilling Unit from the Mobilisation Point, the Contractor shall keep the Company full informed of its location and estimated date of arrival at the first Well Location.

3.2 Demobilisation From Well Location

Contract Number: C-2770

The Company shall be responsible for demobilisation of the Drilling Unit from Company's final Well Location in accordance with the Contract. Upon demobilisation of the Drilling Unit to the Demobilisation Point then the responsibility of the Company ceases and the Contractor responsibilities are as specified in Schedule 3 (Services 2).

4. APPOINTMENT OF CONTRACTOR AND COMPANY REPRESENTATIVES

4.1 Contractor's Representatives

(a) The Contractor shall:

- (i) no later than the Commencement Date, designate an individual as its Representative onboard the Drilling Unit at all times during the Contract;
- (ii) authorise such Representative to direct and control the Contractor's performance of the Drilling Operations and to discuss and agree with the Company all matters which relate thereto; and
- (iii) not remove or replace such Representative without the prior written consent of the Company which shall not be unreasonably withheld.

For the avoidance of doubt, it is expressly acknowledged that the Contractor's Representative on board the Drilling Unit shall not have authority to agree to any amendment or variation of any of the terms or provisions of this Contract or to waive any of the rights, duties or liabilities of the Parties and no action of the Contractor's Representative shall have any such effect.

(b) The Contractor shall in addition:

- (i) designate a Representative onshore who shall be in overall charge of the Contractor's performance of its obligations under this Contract
- (ii) authorise such Representative to act for and bind the Contractor in all matters relating to the Contractor's performance of its obligations hereunder;
- (iii) notify the name of such Representative to the Company at least five (5) days prior to the Commencement Date; and
- (iv) not remove or replace such Representative without the prior written consent of the Company which shall not be unreasonably withheld.

For the avoidance of doubt, it is expressly acknowledged that the Contractor's Representative shall not have authority to agree to any amendment or variation of any of the terms or provisions of this Contract or to waive any of the rights, duties or liabilities of the Parties and no action of the Contractor's Representative shall have any such effect.

4.2 Company's Representative

- (a) The Company shall maintain a Representative onboard the Drilling Unit to represent the Company and to liaise with the Contractor on all day to day matters which arise between the Contractor and the Company hereunder.

Contract Number: C-2770

- (b) For the avoidance of doubt, it is expressly acknowledged that the Company's Representative on board the Drilling Unit shall not have the authority to agree to any amendment or variation of any of the terms or provisions of this Contract or to waive any of the rights, duties or liabilities of the Parties and no action of the Company's Representative shall have any such effect.
- (c) The presence of the Company's Representative onboard the Drilling Unit shall not relieve the Contractor from any of its obligations and liabilities under this Contract.
- (d) The Company shall notify the name of such Representative to the Contractor not later than the Commencement Date. Any subsequent changes shall be notified by the Company to the Contractor as soon as reasonably practicable.

5. DRILLING OPERATIONS**5.1. Provision of Drilling Unit, other Contractor Group Equipment and Contractor Group Personnel**

- (a) The Contractor shall furnish the Drilling Unit together with other equipment, materials, supplies and services detailed in Schedules 1 to 3 and the personnel detailed in Schedule 4 in order to be able to carry out the Drilling Operations in accordance with the Drilling Programme and this Contract.
- (b) The Contractor shall provide rig move procedures and subject to Company's provision of a seabed survey in accordance with Sections 5.2 and 9.3, such procedures will be submitted to the Company for approval at least five (5) days prior to the Drilling Unit's arrival to the Dry Tow Offload Location.

5.2. Provision of Drilling Programme

The Company shall deliver the Drilling Programme for the first Well to the Contractor for the Well Location in good time and Company shall endeavour to provide same no less than fourteen (14) days prior to the Commencement Date. Drilling Programmes for subsequent Wells shall be delivered to the Contractor as soon as reasonably practical.

The Company shall have the right to make changes to the Drilling Programme at any time hereunder on written notice given to the Contractor to that effect.

5.3. Commencement of Drilling Operations

The Contractor shall commence the Drilling Operations promptly after the Commencement Date.

5.4. Conduct of Drilling Operations

The Contractor shall carry out the Drilling Operations on a twenty-four (24) hour per day, seven (7) day per week basis and, except as otherwise directed by the Company, in strict conformity with the Drilling Programme and this Contract.

5.5. Compliance with Drilling Programme

Without prejudice to the generality of Section 5.4, the Contractor shall or shall assist Company's other contractors who shall:

Contract Number: C-2770(a) Mud Programme

- (i) follow the mud programme specified by the Company and shall account to the Company for all mud fluids as directed by the Company; and
- (ii) ensure that all drilling fluid used by the Contractor shall comply with the specifications therefor which are contained in the Drilling Programme.

(b) Casing and Drilling Programmes

- (i) drill the Well to the depth and set casing of the size and at the depths as specified in the Drilling Programme; and
- (ii) test all strings of casing by such methods and in such manner as the Company may require.

(c) Coring (if applicable)

- (i) core between such depths as may be required by the Company and shall deliver samples of all cores to such address or other location as the Company's Representative shall designate for such purpose; and
- (ii) take all necessary precautions to ensure that only the Company and/or any authorised representatives of the Company shall be allowed access to any such cores or core data.

(d) Measurement of Well Depth

- (i) keep accurate measurements and records of all formations encountered during the conduct of the Drilling Operations and shall prepare reports and records relating thereto as requested by the Company or its authorised representatives from time to time; and
- (ii) notify the Company immediately if it shall encounter a formation which reasonably appears to be oil or gas bearing and the Contractor shall thereupon:
 - (a) suspend Drilling Operations for such period as the Company may require to permit the Company to examine such formation; and
 - (b) save and prepare clean samples of the formations drilled.

(e) Production Testing (if applicable)

- (i) perform open hole, cased hole, drill stem or production tests or services as required by the Company from time to time; and
- (ii) ensure that all such tests are carried out in accordance with generally accepted international petroleum industry methods and practices.

(f) Course of Well

- (i) use all reasonable endeavours to drill the Well without deviating from the limits specified by the Company;

Contract Number: C-2770

- (ii) measure any deviations from the vertical during the course of such drilling and provide the Company with all such measurements and other data derived therefrom or relating thereto; and
 - (iii) when the measurements carried out by the Contractor pursuant to Section 5.5(f) (ii) show a deviation from the vertical which is greater than that which is acceptable to the Company, upon receipt of the Company's instructions to that effect, promptly redrill the hole to a deviation that is acceptable to the Company.
- (g) Protectors
 - (i) ensure that all threads on downhole equipment utilised by the Contractor are protected by steel thread protectors; and
 - (ii) keep thread protectors on all casing until it is run and grease the threads as it is made up with a pipe lubricant acceptable to the Company; and
 - (iii) in order to reduce the risk of deterioration of casing the Contractor shall, if required by the Company, use casing wear protectors on the drill pipes.
- (h) Fishing Tools
 - (i) provide all necessary fishing tools, accessories and spare parts as listed in schedule 1a which are required to effect the recovery of its downhole equipment; and
 - (ii) unless otherwise directed by the Company, not permit the running of any downhole tool in the Well unless suitable downhole fishing tools, as determined by the Company, are used.
- (i) Completion, Suspension or Abandonment of Well
 - (i) if the Company elects to complete the Well as a future producing well, complete the Well as directed by the Company, including running casing and liner and installing permanent or temporary wellheads;
 - (ii) if the Company elects to suspend the Well, suspend the Well as directed by the Company including running a corrosion cap on top of the Well on the seabed; and
 - (iii) if the Company elects to abandon the Well, upon the request of the Company promptly remove from the Well and return to the Company forthwith all recoverable casing and tubing, and plug and abandon such Well in compliance with the Company's directions and Applicable Law.

5.6 Daily Drilling Report

The Contractor shall prepare and furnish to the Company the Daily Drilling Report. Each Daily Drilling Report shall contain a complete and accurate report of the day's operations, showing a breakdown of the rates applied to the nearest half (½) hour, shall be signed by the Contractor's Representative on board the Drilling Unit, and shall be delivered to the Company's Representative as soon as possible after midnight of the day to which it relates (but in any event no later than 6 a.m. on the following day) for approval and countersignature on behalf of the Company. Any differences of opinion

Contract Number: C-2770

between the Contractor's and the Company's Representatives regarding matters contained in any Daily Drilling Report shall be noted thereon. The Daily Drilling Report (including notes if any) shall be emailed or faxed to the Company's UK offices/ Lagos Offices before 7 a.m. (Lagos, Nigeria, time) on the following day by the Contractor.

6. EQUIPMENT, SUPPLIES AND SERVICES

6.1. Representations

- (a) The Contractor represents that:
 - (i) the Drilling Unit is capable of being moved to and from the Well Locations specified by the Company and of drilling to a maximum depth of 25,000ft in a water depth range of 30 – 350ft and is in every respect capable and suitable for the conduct of the Contract;
 - (ii) the Drilling Unit is constructed pursuant to the classification stated in Schedule 1a and, together with its ancillary equipment and appurtenances shall be maintained in such class throughout the term of this Contract;
 - (iii) The Drilling Unit is undergoing a reactivation, and Contractor does not have any knowledge of any damage or defects which will or might reasonably be expected to necessitate repairs to the Drilling Unit which would interrupt or delay Drilling Operations within the term of this Contract;
 - (iv) the Drilling Unit and all other Contractor Group Equipment shall be in good working order and, subject to the design limitations of the Drilling Unit, Contractor's operating procedures, and normal wear and tear, the equipment shall perform within manufacturers' specifications.

6.2. Inspection of Drilling Unit and other Contractor Group Equipment

- (a) Inspection requirements for drill pipe, drill collars, and other down hole tools
 - (i) The Contractor shall carry out a complete inspection of all drill pipe, HWDP and drill collars that are due for inspection prior to the Commencement Date, and thereafter per the required/agreed inspection program, to the standard of DS1 Cat 3. Any required repairs shall be at Contractor's sole cost.
 - (ii) Notwithstanding the provisions of Section 6.2(a)(i), the Contractor shall carry out further such inspections of all drill collars, downhole equipment regularly in use, and drill pipe at the request of the Company should repeated failures (repeated meaning "more than once") with such equipment arise in the course of the Contract. Costs of such inspection will be at the sole cost of the Contractor.
 - (iii) Except as otherwise directed by the Company, all inspections shall include but not be limited to the following tests:
 - (aa) Magnetic particle inspection;
 - (bb) Ultrasonic inspection;

Contract Number: C-2770

- (cc) Inside and outside optical inspection;
 - (dd) Gauging of the outside diameter;
 - (ee) Drill pipe tool joint threads and general inspection; and
 - (ff) Drill collars tool joint general inspection and full length magnetic particle inspection.
- (iv) The result of all inspections shall be made available to the Company and the DS1 Cat 3 inspection standard followed to accept or reject pipe within the criteria that only new or premium class pipe shall be used.
- (b) Hard Banded Drill Pipe
- 5" drill pipe or other size as mutually agreed will be supplied with EZ700 or Armacor M hardbanding or equivalent.
- (c) Inspection by Company

Notwithstanding the provisions of Section 6.2(a)(i), the Company shall have the right, at its cost, to inspect the Drilling Unit and/or the Contractor Group Equipment at any time, whether prior to the Commencement Date or after, to ensure that same conform to the requirements of this Contract. Inspections conducted prior to the Commencement Date shall be subject, if applicable, to prior approval and consent of the current operator to whom the Drilling Unit is contracted to, provided Contractor shall exercise endeavours to procure such approval/consent. If applicable, this will include the acceptance tests detailed in Schedule 1b. Inspection conducted after the Commencement Date shall be conducted at the Standby Rate and at the sole cost and expense of Company

Contractor shall correct at its sole cost and expense all deficiencies outlined in Schedule 10 prior to the Commencement Date to Company's reasonable satisfaction.

In addition to the repairs outlined in Schedule 10, Company and Contractor shall mutually agree on a work scope and forward plan to rectify any non-conformity under the Contract before or after the Commencement Date if further deficiencies are identified. If any further deficiencies identified by the Parties and not included in Schedule 10, prevent or substantially delay or interrupt Drilling Operations, the Contractor will rectify them at its sole cost.

Any inspections carried on by Company per this Section 6.2 shall not relieve the Contractor of any of its representations or obligations set forth elsewhere in this Contract.

6.3. Maintenance of Drilling Unit and Contractor Group Equipment

- (a) The Contractor shall ensure that the Drilling Unit and all other items of the Contractor Group Equipment are properly maintained and repaired as necessary prior to the Commencement Date and throughout the term of the Contract, in accordance with the original manufacturers' current standards and procedures therefor.

Contract Number: C-2770

Upon the Commencement Date, the Drilling Unit and all equipment shall be in good working order per applicable industry standards and shall comply with the design parameter and manufacturer's specifications of the Drilling Unit and equipment, operating procedures, Company's quality requirements and as provided herein, including, but not limited to, the provisions included in Schedule 10 herein.

- (b) The status of the Contractor's maintenance programme shall be made available on a regular basis to the Company's Representative upon request. Such status shall highlight, inter-alia, all maintenance performed during the term of the Contract and any outstanding maintenance that was planned but which was not completed for any reason together with the Contractor's plan for completing the same.
- (c) The Contractor shall carry out and commence to remedy any necessary repairs or replacements to the Drilling Unit and other Contractor Group Equipment promptly and in such a manner as to prevent or minimise any delays or interruptions to the Drilling Operations.
- (d) Without prejudice to the foregoing provisions of this Section 6.3, the Contractor shall provide, store and maintain at all times sufficient levels of spare parts and operating supplies sufficient to ensure the continuous and efficient operation of the Drilling Unit and of other Contractor Group Equipment.
- (e) The Contractor shall be responsible for arranging delivery of all spare parts and operating supplies from their point of origin to the Supply Base.
- (f) Contractor shall maintain the Drilling Unit clean per applicable prevailing international oil and gas industry standards during the term of the Contract to prevent any safety or environmental incidents from occurring or any delays to Company's Drilling Operations.

6.4. Company Group Equipment

- (a) The Contractor shall afford the Company all assistance as reasonably practicable at the shipyard in Singapore during rig reactivation and / or at the Dry Tow Offload Location the Company Group Equipment onboard the Drilling Unit. Such loading operations at the Dry Tow Offload Location shall be compensated and paid for by Company to Contractor at Zero Rate for up to two (2) days, and thereafter at the Standby Rate in accordance with Schedule 6 – Compensation Section A. Any loading during the TIP process shall be payable as follows: (i) at 50% of Standby Rate if done within the 21 days allotted for the TIP process to be completed; or (ii) thereafter from day 22 up to day 60, at zero rate.
- (b) The Contractor shall examine the Company Group Equipment before using the same and shall promptly report to the Company any apparent or visible defects therein to allow the Company to replace the same.
- (c) The Contractor shall during the Drilling Operations and thereafter until such time as the Company Group Equipment shall have been fully off-loaded pursuant to the following provisions of this Section 6.4:

Contract Number: C-2770

- (i) properly store and protect the Company Group Equipment onboard the Drilling Unit;
 - (ii) maintain the Company Group Equipment in good condition and repair, provided however that Contractor has the technical expertise to do so and the cost of any third party personnel, replacement or spare parts or materials reasonably and necessarily required so to maintain the same shall be for the Company's account; and
 - (iii) provide the Company with all necessary assistance for off-loading the Company Group Equipment from the Drilling Unit in accordance with Section 6.4(d).
- (d) Unless otherwise agreed between the Parties, on completion of the Drilling Operations the Contractor shall redeliver to the Company on the Drilling Unit all items of the Company Group Equipment in Contractor's possession prior to the Completion Date. The Company Group Equipment shall be so redelivered by the Contractor in as good condition as when received by the Contractor, fair wear and tear excepted, and shall be accompanied by all relevant documentation properly completed.

6.5. Fuel

- (a) As soon as reasonably practicable following the Commencement Date, the Contractor shall measure the quantity of diesel fuel then onboard the Drilling Unit in the presence of the Company Representative. The Contractor shall thereafter send to the Company its written invoice for an amount equal to the price actually paid by the Contractor for such fuel, as evidenced in writing by the Contractor.
- (b) With effect on and from the Commencement Date until the Completion Date, the Company shall be responsible for supplying all of the Drilling Unit's requirements for diesel fuel at Company's cost.
- (c) The Contractor shall purchase the inventory of diesel fuel on board the Drilling Unit at the Completion Date at the documented price actually paid by the Company for such fuel, as evidenced in writing by Company. The Contractor shall issue to the Company the appropriate credit note covering said purchase of diesel fuel within thirty (30) days of the Completion Date.

6.6. Lubricants

The Contractor shall be responsible for purchasing all lubricants and greases required by the Drilling Unit and by the Contractor Group Equipment.

6.7. Catering Services

The Contractor shall provide on board the Drilling Unit full catering, laundry and recreational facilities in accordance with the requirements set out in Schedule 8.

6.8. Medical Facilities

The Contractor shall provide on board the Drilling Unit full medical facilities in accordance with the requirements set out in Schedule 8.

7. PERSONNEL

Contract Number: C-2770

7.1. Representation

The Contractor represents that the Contractor Group Personnel, provided in accordance with Schedule 4, are suitably and properly qualified, trained, competent and experienced in all respects to properly perform the duties which will be assigned to them by the Contractor to undertake Contractor's obligations under the Contract, including, but not limited, to any required certification, work or safety permits. If required by the Company, the Contractor shall verify relevant qualifications of the Contractor Group Personnel.

7.2. Key Personnel

Persons designated as Key Personnel in Schedule 4 shall be fluent in the English language, both oral and written, and shall be capable of communicating effectively with all other Contractor Group Personnel and with the Company's representatives. The CV's of all proposed Key Personnel shall be submitted to Company at least seven (7) days prior to the Commencement Date. The Company shall have the right to object to, in writing, and require the Contractor to replace forthwith at Contractor's cost and expense any such proposed Key Personnel who, in Company's reasonable opinion, are not suitable. Key Personnel shall not be replaced without the prior written consent of the Company which shall not be unreasonably withheld or delayed. Personnel approval or request for removal by the Company shall not relieve the Contractor from its obligations herein.

7.3. Good Order and Discipline

- (a) In the performance of the Contract the Contractor shall maintain strict discipline and good order among the Contractor Group Personnel.
- (b) The Contractor shall ensure that no alcohol, drugs or other prohibited substances shall be taken to or consumed on the Drilling Unit or on the flight to/from the Drilling Unit.

7.4. Replacement of Contractor Group Personnel

The Company shall have the right at any time to object to, in writing, and to require the Contractor to remove forthwith at its own cost and expense any Contractor Group Personnel who, in the reasonable opinion of the Company, is:

- (a) proven to be incompetent or negligent in the performance of their duties; or
- (b) proven not to be suitable to safely and efficiently carry out the duties to which that person may be assigned; or
- (c) engaged in activities which are contrary or detrimental to the interests of the Company; or
- (d) not conforming with the relevant safety procedures described in Schedule 7.

7.5. Medical Fitness

- (a) The Contractor shall ensure that all of the Contractor Group Personnel shall have had a regular medical examination to recognized oilfield standards, prior to commencement of the Drilling Operations and that they are physically and mentally fit to provide the Work herein.

Contract Number: C-2770

- (b) A registered medical practitioner shall conduct all such medical examinations in accordance with accepted international medical standards and the minimum requirements set out in Schedule 8. Should the Contractor fail to have complied with Schedule 8 and any Contractor Group Personnel require emergency, unscheduled evacuation from the offshore facility for medical treatment as a result of this failure, the Contractor shall, in addition to any other obligation or liability it may have to the Company at law or hereunder (and without limitation to the generality of the provisions of Section 13), reimburse the Company any direct, documented costs incurred by the Company arising out of or in connection with such evacuation.
- (c) On request from the Company, the Contractor shall promptly provide the Company with a copy of all medical certificates relating to such personnel, where permitted by Applicable Law.

7.6. Survival and Training Courses

- (a) Pursuant to Schedule 7, the Contractor shall ensure that all of the Contractor Group Personnel performing services hereunder shall have attended all survival, safety and operational (including without limitation with respect to well control) training courses required by Applicable Law in the Area of Operations and as is generally consistent with international petroleum industry practice. Any such training of Contractor Group Personnel required by Company which exceeds the above criteria shall be at the cost of Company.
- (b) The Contractor shall, if requested, forthwith produce certificates of completion or attendance of any training courses for the Company's inspection.

7.7 Transportation of Contractor Group Personnel

The Contractor shall provide or procure transportation for the Contractor Group Personnel between their home base and the Air Base.

7.8 Medivac of Contractor Group Personnel

The Company shall be responsible for the medical evacuation of Contractor Group Personnel from the Drilling Unit to the Air Base or other suitable onshore location. The Contractor shall be responsible for the medical evacuation of same therefrom to any other location for medical treatment as required. Contractor shall have in place during the term of this Contract suitable arrangements/coverage to carry out such medical emergency evacuation. Notwithstanding the foregoing, the Company may, subject to the agreement of the Contractor's Representative onshore, make its own arrangements to evacuate any Contractor Group Personnel from the Air Base (or other suitable onshore) to another location for medical treatment. The cost of such medical evacuation arranged by the Company shall be reimbursed by the Contractor at documented cost. Upon request from the Company, the Contractor shall provide evidence of Medivac coverage.

8. GENERAL RESPONSIBILITIES OF THE CONTRACTOR**8.1. Standard of Performance**

The Contractor represents that it shall perform the Contract:

- (i) in a good, diligent, safe and workmanlike manner and with due regard to the protection of the environment;
- (ii) in accordance with good international oilfield drilling and safety practices including, without limitation, the standards from time to time of the API and IADC; and
- (iii) with that degree of skill, care and diligence ordinarily exercised by skilled and experienced drilling contractors engaged in similar operations in the same or similar circumstances and conditions.

8.2. Compliance with Instructions

Subject to the Contractor's rights and responsibilities as an independent contractor pursuant to Section 29, the Contractor shall comply with all instructions and directions issued by or on behalf of the Company on matters relating to the Drilling Operations, provided such instructions are not in conflict with Applicable Law and/or the Contractor's health, safety and environmental policy.

Notwithstanding the above, if Contractor's health, safety and environmental policy is less stringent than Company's instructions and directions, then Contractor shall comply with such instructions and directions.

8.3. Health, Safety and the Environment

- (a) The Contractor represents that:
 - (i) as at the date of this Contract it has, and shall at all times during the term of this Contract maintain, a clear and comprehensive health (including substance abuse), safety and environmental policy acceptable to the Company;
 - (ii) it shall provide the Company with a copy of its health, safety and environmental policy promptly after the effective date of this Contract and further, that it shall forthwith make and implement any changes thereto which are mutually agreed between the Parties; and
- (b) it shall at all times observe and comply with and shall ensure that the Contractor Group Personnel shall be made aware of, observe and comply with the terms of the HSE Policy. The Company shall have the right to carry out ad hoc audits of the Contractor's compliance with the provisions of this Section 8.3. The Contractor shall forthwith rectify at its sole cost any deficiencies which are notified to the Contractor by the Company following any such audit within the time frame agreed to by the Parties.

8.4. Reporting of Accidents

- (a) The Contractor shall notify the Company forthwith of any accidents or incidents resulting in personal injury to or the death of any person or damage to any property arising out of or as a consequence of the Drilling Operations.

Contract Number: C-2770

- (b) The Contractor shall promptly thereafter take all necessary remedial action in respect of any such accident or incident and shall prepare such reports thereon as may be required by Applicable Law or as may be required by the Company from time to time.

8.5. Inspections, Measurements and Reports

- (a) The Contractor shall at all times permit the Company and its authorised employees and representatives to inspect the performance or results of any Well and of all measurements and tests made in connection with such part of the Contract.
- (b) The Contractor shall keep accurate measurements and records relating to the Drilling Operations including, but not limited to penetration rate, rotary torque, rotary RPM, pump pressure and strokes for each mud pump and hook load and shall prepare and furnish copies thereof to the Company on a daily basis.
- (c) The Contractor shall furnish the Company's designated representatives with the Daily Drilling Report and any other relevant information requested by the Company in accordance with Section 5.6.

8.6. Import – Export

- (a) Not used
- (b) The Contractor shall use every option available including the temporary import regime to import and maintain the Drilling Unit with full exemption from import duties and/or taxes and in doing so may require assistance from the Company. Through no fault of its own, should the Contractor be assessed and required to pay import duties and/or taxes on the import of the Drilling Unit, the Company shall reimburse the Contractor in full for any such duties and/or taxes incurred. Company will accept no costs, other than documented Temporary Importation charges, for any delays associated with importation of the Drilling Unit into Nigeria and exportation of the Drilling Unit from Nigeria. Notwithstanding the foregoing, if the Drilling Unit is delayed or operations are interrupted whilst on hire to Company due to Temporary Import problems which are beyond Contractor's control Company shall compensate Contractor at the Standby Rate in accordance with Schedule 6 – Compensation Section A for any such delay or interruption, provided Contractor has demonstrated that all reasonable steps within its control have been taken.
- (c) The Company will provide all such assistance as the Contractor may reasonably require in connection with the performance of the Contractor's obligations under Section 8.6(a) and Section 8.6(b).
- (d) The Contractor shall promptly provide the Company with a complete set of all relevant documentation which the Contractor shall obtain pursuant to Sections 8.6(a) and 8.6(b), together with all such other related information or documentation as the Company shall require.

8.7. Blow-out and Fire Hazard

- (a) The Contractor shall exercise all possible due diligence and care to prevent fire, explosion and blowouts. The Contractor shall have and maintain well control and

Contract Number: C-2770

blow-out prevention equipment in accordance to Applicable Law, Original Equipment Manufacturer Certificate of Compliance and Contractor's procedures ("Agreed Maintenance"). If requested, the Contractor shall provide the Company with copies of such procedures.

- (b) The Contractor shall use blow-out prevention equipment which complies with the Agreed Maintenance. Said blow-out prevention equipment shall be configured as mutually agreed between Company and Contractor. Contractor shall only utilize original equipment manufacturers spare parts for blow-out prevention equipment.
- (c) The Contractor shall at all times maintain well control and blow-out prevention equipment in good condition per the Agreed Maintenance.
- (d) The Contractor shall examine and test all blow-out prevention equipment per the Agreed Maintenance. Test results shall be noted on the Daily Drilling Report.
- (e) Subject to Section 8.7(f) below, in the event of blow-out or loss of control, the Contractor shall take all measures necessary to protect the Well and to bring the Well under control.
- (f) Subject always to Contractor's underwriters approval and to the offshore installation manager's overall responsibility for the safety of the Drilling Unit and all personnel onboard, the Company shall have the right exercisable at any time to direct the conduct of blow-out or loss of control operations and to use the Contractor Group Equipment and Contractor Group Personnel during such times to bring the Well under control. The person designated as offshore installation manager is specified in Schedule 4.

8.8. Pollution/Dumping

The Contractor undertakes that except for fluids and cuttings originating from any Well which have been authorised by the Company and are allowable under Applicable Law for discharge to the sea, nothing shall be dumped, jettisoned, discharged, spilled or intentionally dropped from the Drilling Unit.

8.9. Removal of Wreck

- (a) If the Drilling Unit or any other item of the Contractor Group Equipment becomes stranded, capsizes, sinks or becomes a wreck or obstruction to navigation, the Contractor shall at its own cost promptly raise and remove the same if required by Applicable Law or if the wreckage/debris interferes with Company or its Co-Venturer's operations.
- (b) The fact that the Drilling Unit or any other item of the Contractor Group Equipment is insured or shall have been declared an actual, constructive, compromised or arranged total loss shall not relieve the Contractor from any of its obligations and responsibilities under this Contract.

8.10 Transportation of Contractor's Equipment

- (a) The Contractor shall comply with all the Company's requirements regarding delivery of the Contractor Group Equipment to the Supply Base. The Company's requirements include, but are not limited to the following:

Contract Number: C-2770

- (i) the Contractor shall ensure that the Contractor Group Equipment delivered to the Supply Base is correctly packaged, labelled and documented in accordance with all Applicable Law and the requirements of the Company; and
 - (ii) the Contractor shall ensure that the Contractor Group Equipment is suitably packed and protected for onward shipment in suitable classified and certified containers complete with fully certified lifting equipment in accordance with all Applicable Law.
 - (iii) Contractor and Company shall respectively ensure that Contractor's equipment and Company's equipment is pre-slung in accordance with relevant procedures and standards of Contractor's management system and Company's requirements.
- (b) If any of the Contractor Group Equipment does not comply with Section 8.10(a), the Company shall not accept delivery of such Contractor Group Equipment, and shall be considered as not delivered for purposes of this Contract.
 - (c) The Contractor shall unload and load the Contractor Group Equipment and the Company Group Equipment at the Drilling Unit from and to any transport provided by the Company. The Contractor shall ensure all such Contractor Group Equipment and the Company Group Equipment is handled in a proper and safe manner with particular reference to dangerous or hazardous material.

8.11 Blow Out Prevention Equipment

The Contractor represents that, when the Well is being drilled, deepened, serviced, worked-over, completed and/or re-conditioned:

- (a) blow-out preventer(s) of standard make will, when in accordance with the Agreed Maintenance requirements and as per best oilfield practices, be set on surface casing, or the well-head and installed and tested in accordance with usual practice; and
- (b) it will comply with all American Petroleum Institute ("API") regulations and requirements in respect of fitting storm chokes and other equipment to minimise damage or pollution.

8.12 Predrill Planning and Preparatory Work

Prior to the Commencement Date, the Contractor shall assist the Company in the following predrill planning and preparatory work:

- (a) assistance in preparation of any permit applications to the regulatory authorities;
- (b) assistance in preparation of any notifications required to regulatory authorities;
- (c) assistance in preparation of the bridging documents to cover operations and emergency procedures;
- (d) assistance in preparation of the onshore emergency response bridging documents;

Contract Number: C-2770

- (e) assistance in training of key operations personnel for any abnormal or specialised activities;
- (f) implementation of Drilling Unit modifications as mutually agreed and pressure/function testing of well control equipment;
- (g) any work required to address deficiencies of the Drilling Unit in accordance with the Contract identified in inspections performed by the Company and/or any independent survey teams;
- (h) assistance in completing any Company or independent environmental audit of the Drilling Unit;
- (i) assistance in preparation of an environmental awareness training package in accordance with the Company's Environmental Management System (EMS). An environmental awareness training package may have to be completed by all offshore based personnel and key operations personnel.

9. GENERAL RESPONSIBILITIES OF THE COMPANY**9.1 Company Group Personnel and Company Group Equipment**

The Company shall provide the personnel, equipment, materials, supplies and services detailed in Schedule 3.

9.2 Company to Obtain Licences and Approvals

- (a) The Company shall at its own cost obtain all necessary licences and authorisations required to be obtained by the Company to permit the performance by the Contractor of the Drilling Operations at the Well Location.
- (b) The Company shall advise the Contractor of any restrictions, conditions or limitations contained in any such licences or authorisations which will affect the free right of entry to and/or exit from the Well Location and/or the conduct of the Drilling Operations.

Any delays caused by Company's failure to obtain such licences or authorisations which will affect the free right of entry to and/or exit from the Well Location and/or the conduct of the Drilling Operations shall be compensated and paid for by Company to Contractor at the Standby Rate in accordance with Schedule 6 – Compensation Section A.

9.3 Seabed Survey

Company has the obligation to provide Well Locations that are level, free of obstacles or obstructions, and capable of supporting the Drilling Unit. Without prejudice to the provisions of Section 9.2, the Company shall obtain seabed survey report and soil data report in respect of the Well Locations prior to the commencement of Drilling Operations at such locations and shall make the results of such survey available to the Contractor pursuant to Clause 5.2 no later than 2 (two) weeks prior to the commencement of the Drilling Operations. In the event that additional surveys are required by Contractor's underwriters, the same shall be provided by Company at the cost of Company. All expenses associated with clearing, preparing or improvements to the seabed, including, without limitation, gravel or rock dumping and sandbagging, and repositioning the Drilling Unit at any location shall be for Company's account and Standby Rate shall apply during

Contract Number: C-2770

such times. Standby Rate shall also apply in the event the Well Location is not ready for the Drilling Unit to safely position and jack and Contractor has to wait while the location is being prepared or an alternative location is being selected. In the event that the Drilling Unit suffers a punch-through, Company shall pay and provide tow vessels to tow the Drilling Unit to a suitable shipyard to carry out the necessary repairs as applicable. Moving Rate shall apply for towing the Drilling Unit to / from the Well Location to a sheltered location or suitable shipyard to carry out the necessary repairs. Standby Rate shall apply while the required repairs are being conducted up to a maximum of thirty (30) days, thereafter the rate shall be zero until completion of repairs.

9.4 Transportation of Contractor Group Personnel and Contractor Group Equipment

The Company shall provide or procure the provision of:

- (a) air/marine transportation of the Contractor Group Personnel, together with such other personnel as may be agreed in writing by the Company, between the Drilling Unit and Air Base/Supply Base; and
- (b) marine transportation of the Contractor Group Equipment (other than the Drilling Unit) between the Drilling Unit and the Supply Base.

9.5 Delays in Transporting Contractor Group Personnel

If the transportation of the Contractor's relief crew between the Air Base and the Drilling Unit is delayed due to adverse weather conditions or by other circumstances which are outside the reasonable control of the Contractor, the Company shall reimburse the Contractor for any accommodation and subsistence costs which are reasonably incurred by such relief crew during the period of such delay up to a maximum continuous period of seven (7) days only, provided that such costs shall be properly substantiated to the Company's reasonable satisfaction.

9.6 Unscheduled Transportation

Notwithstanding the provisions of Section 9.4 and subject to Section 13.4 the costs of any unscheduled air or marine transportation which is provided by the Company in respect of the Contractor Group Equipment which has failed or which has broken down due to the fault or negligence of Contractor, and/or replacement of the Contractor Group Personnel pursuant to the provisions of Section 7.4, shall be for the Contractor's account.

10. COMPENSATION

- 10.1** Subject to the following provisions in this Section 10, the Company shall pay the Contractor, as full compensation for the Drilling Operations and all other obligations under this Contract, the rates, lump sums, prices and fees set forth in Schedule 6 - Compensation.

Except as otherwise provided in this Contract all such rates, lump sums, prices and fees shall be fixed and firm for the term of this Contract. The currency of all such rates, lump sums, prices and fees shall be Dollars and the currency of payment shall be Dollars.

Contract Number: C-2770

All such day rates shall be based on a twenty-four (24) hour day and any part thereof shall be pro-rated to the nearest half (1/2) hour.

The Contractor is deemed to have satisfied itself as to the circumstances (including risks and contingencies) affecting the price for the Drilling Operations and/or the cost to the Contractor of carrying out the Contract and to the correctness and the sufficiency of the rates, lump sum prices and charges specified in this Contract which shall, except insofar as it is otherwise provided in this Contract, cover all its obligations under this Contract and all matters and things necessary for the proper execution and maintenance of the Contract (including mobilisation and demobilisation operations).

10.2 Operating Rate

Subject to the other provisions of this Section 10, the Company shall pay the Contractor the Operating Rate during the Operational Period.

10.3 Standby Rate

Except as otherwise provided in the Contract, the Company shall pay the Contractor the Standby Rate during the Operational Period when:

- (a) the Drilling Unit is otherwise ready in all respects to carry out the Drilling Operations at the Well Location, but such Drilling Operations are suspended on the instructions of the Company, waiting on delivery of the Company Group Equipment, failure/loss/damage of the Company Group Equipment and/or whilst waiting on weather; or
- (b) Drilling Operations are being performed that do not require the use of power to the draw works, the rotary table, the top drive or mud pumps or any rotating equipment including, without limitation and if applicable, well testing (all DST operations after setting the Packer until releasing Packer), electric wire-line works including rigging time and Gyro or cased hole surveys, including rigging time; or
- (c) the Drilling Unit is moving between Well Locations, from the moment that the Drilling Unit commences jacking down at its current location until the Drilling Unit is jacked up at Company's next Well Location; or
- (d) the Drilling Unit is otherwise ready in all material respects but Contractor is delayed by the relevant Nigerian authority in issuing all necessary import or export permits provided that the delay is not due to any fault of Contractor; or
- (e) Company Group equipment is loaded onto the Drilling Unit at the Mobilisation Point pursuant to Section 6.4a); or
- (f) the Drilling Unit is inspected by Company prior to the Commencement Date pursuant to Section 6.2c).
- (g) Repairs are being performed to the Drilling Unit and/or Contractor Group Equipment due to damage caused by the Company Group or caused by Company Group Equipment through no fault of Contractor, including any move of the Drilling Unit to dry dock or safe harbour location for performing the repairs per the provisions of this Section 10.3(g).

10.4 Repair Rate

Contract Number: C-2770

Except as provided in Section 10.3(g), if at any time during the Operational Period the Contractor is not able to conduct Drilling Operations because of failure, loss, breakdown and/or damage to the Drilling Unit and/or to other Contractor Group Equipment then, from the cessation of such Drilling Operations until the Drilling Unit is fully repaired and ready to recommence Drilling Operations at the same point (including any trip time, e.g. "drill to drill") as when the failure occurred the Contractor shall be paid the Repair Rate, or if the Contractor is in material breach of any provision of this Contract which causes a suspension of Drilling Operations the Company shall be entitled, without prejudice to Section 21.3(a) or to any of its other rights under this Contract or at law, to treat such material breach as a failure of the Drilling Unit under this Section 10.4 and the terms of this Section 10.4 shall apply mutatis mutandis from the cessation of such Drilling Operations until Contractor has rectified such breach and has fully recommenced Drilling Operations at the same point (including any trip time, e.g. "drill to drill") as when the material breach giving rise to such suspension occurred, provided that payment of the Repair Rate shall be:

- (a) conditional upon the giving of written notice by the Contractor to the Company as soon as practicable following the occurrence of the incident in question, detailing the nature, extent and cause of such failure/loss/breakdown/damage together with the Contractor's best estimate of the duration of the resulting repairs or replacement;
- (b) limited to a maximum cumulative total of twenty-four (24) hours per calendar month, pro-rated for partial months. Thereafter, no day rate shall be payable.

The Repair Rate shall not apply during routine maintenance such as replacing the swivel, replacing pump liners, slipping the drill line or lubricating the Drilling Unit which in no event shall take longer than two (2) hours per day

Neither the Repair Rate nor any other day rate shall be paid to the Contractor at any time during the Operational Period when:

Contractor moves the Drilling Unit away from the Well Location for any UWILD survey in dry dock, port, repair facility, or elsewhere, except in the event such activity is carried out during the TIP process and does not impact the critical path of the process. Company shall provide fuel and vessels at its expense to move the Drilling Unit from the Well Location to an open water location. Such open water location will be discussed and mutually agreed between both Parties.

10.5 Force Majeure Rate

The Company shall pay the Contractor the Force Majeure Rate during the Operational Period when Drilling Operations are suspended due to Force Majeure.

10.6 Mobilisation and Demobilisation

The Lump sum Mobilisation Rate, as detailed in Schedule 6 – Compensation, shall be paid by Company to Contractor for the period from Commencement Date until the time and date the Drilling Unit is one (1) nautical mile from Company's first Well Location at whereupon the Moving Rate (or another applicable rate) shall apply.

Contract Number: C-2770

During demobilisation the Moving Rate will be payable in accordance with Section 10.9b). For the avoidance of doubt any delays or interruptions of the demobilisation within Contractor's control shall be payable at zero rate.

10.7 Early Termination

If, pursuant to Section 21.6(b), the Contract is terminated in accordance with either Section 21.3(i) or 21.8 then Company shall immediately pay Contractor the following amounts as liquidated damages, a debt due and payable, and not as a penalty:

- (i) the Operating Rate for the total number of days remaining under the Firm Term and any additional term (if applicable) of the Contract payable as provided in Section 11; and
- (ii) rates and fees earned and reimbursable costs and expenses incurred or due and payable under the Contract prior to the effective date of termination payable as provided in Section 11.

provided always that any compensation payable under (i) above shall be subsequently reduced by repayments (or discounts to the sums due) equal to the daily operating rate and other applicable rates of any substitute contract that may be secured by Contractor for either all or any portion of the remaining number of days of the Contract .

10.8 Redrill Rate

The Company shall pay the Contractor the Redrill Rate for Drilling Operations specified in Section 13.10 and/or Section 13.6 due to the sole negligence or wilful misconduct of Contractor.

10.9 Moving Rate

a) The Moving Rate shall apply from a point of one (1) nautical mile from Company's first Well Location and will continue during the Drilling Unit move until the point in time the Drilling Unit is jacked up at Company's first Well Location. The Moving Rate shall apply during inter wells move from the point in time the Drilling Unit starts jacking down for the move to the Company's second Well Location or any subsequent Well Location thereafter until that the point in time the Drilling Unit is jacked up at the second Well Location or any other subsequent Well Location thereafter respectively.

b) The Moving Rate shall apply from the date and time the Drilling Unit is one (1) nautical mile away from Company's last Well Location and shall continue to apply until the Completion Date.

10.10 Rate Conflict

The Parties recognise that in given situations more than one day rate may apply. In any case where two or more day rates could apply to a given situation, the Parties agree that the Contractor shall be paid at the highest applicable day rate.

10.11 Reimbursable Items

Contract Number: C-2770

The services and equipment to be provided by the Contractor and reimbursed by the Company at documented cost with or without a handling charge are specified in Schedule 3.

11. INVOICING AND PAYMENT**11.1 Submission of Invoices**

11.1(a) Contractor shall submit to Company an invoice each month relating to the period commencing on the 26th calendar day of each month and termination on the 25th calendar day of the current month.

Upon completion or termination of this Contract whichever is earlier, Contractor shall no later than thirty (30) calendar days provide final reconciliation and either refund Company to Company's nominated bank account, moneys overpaid by Company or invoice Company any sums due in accordance with Sections 11.1(a) (i) and (ii) above.

11.1(b) Invoices shall be sent to the address specified in Schedule 6. All invoices shall include the following minimum information:

- Contract Number
- Location where Work is being performed
Rig and well name
- Description of the Work (indicate quantity and unit of measurement) including, but not limited to, monthly Drilling Unit time breakdown, including applicable charge rates pursuant to this Contract.
- Time period in which Work was provided, accompanied by delivery tickets for equipment (including materials and other items), with details of the type and number of each item delivered, the location and date of delivery
- Time sheets for Contractor's personnel, indicating the dates and locations that such personnel worked or were on standby.
- Unit rate or day rate
- Total amount due (both in figures and words)
- Catering records.
- Originals of all invoices for reimbursable costs.
- Banking information for payment purposes to include: bank name and location, routing code, swift code and account number, including any intermediary bank information if applicable.

11.2 Payment By Company

11.2(a) (i) The Company shall pay all sums invoiced by Contractor within forty five (45) calendar days after receipt by the Company.

11.2(b) the making of any payment by Company pursuant to this Section 11.2 shall be without prejudice to the Company's rights under this Contract, nor shall it be deemed to constitute acceptance by the Company of defective work.

11.2(c) Interest shall be payable for late payment of (i) correctly prepared and supported invoices and (ii) undisputed amounts payable on disputed invoices and (iii) disputed amounts that become payable to Contractor. The

Contract Number: C-2770

amount of interest payable shall be the published LIBOR "Base Rate" on the initial due date of payment, accrued from the due date for payment until actual payment.

11.3 Disputed Invoices

In the event of Company disputing any item of an invoice, Company shall, within seven (7) working days following receipt of such invoice, notify Contractor of the item in dispute and specify its reasons for dispute. Both Company and Contractor shall confer in good faith to resolve the disputed amount. Payment in respect of such item in dispute shall be withheld until settlement of the dispute.

The Company will pay the undisputed amount as set out in Section 11.2, provided that the Contractor resubmits a revised invoice for such undisputed amount. A revised VAT invoice tying to such revised invoice must be submitted at the same time. Requiring the re-submission of the invoice is to allow Company to make a payment within tax guidelines for the undisputed portion and is not intended to compromise the Contractor's right to claim for the disputed portion.

12. CUSTOMS, DUTIES AND TAXES

- 12.1** a) Unless otherwise specified herein, Contractor shall be responsible for the physical import and export of Contractor's Drilling Unit and its equipment and spares. Company shall be recharged at documented costs by Contractor for all import or export charges or customs or excise duties, taxes and fees including without limitation, local sales taxes, VAT, clearing agents' for the physical import and export of the Drilling Unit and such equipment and spares at the point of entry to Nigerian waters from the Mobilisation Point
- b) Subject to 12.1 a) the Contractor shall be responsible for and shall indemnify, defend and hold harmless the Company Group, against all import or export charges or customs or excise duties, taxes and fees including, without limitation, local sales taxes, VAT, clearing agents' fees or other similar taxes or fees which are levied on the Contractor Group Equipment during Drilling Operations.
- 12.2** Unless otherwise specified herein, Contractor shall be responsible for and shall indemnify, defend and hold harmless the Company Group against all import or export charges or customs or excise duties, taxes and fees including, without limitation, local sales taxes, VAT, clearing agents' fees or other similar taxes or fees which are levied on the personal property of the Contractor Group Personnel.
- 12.3** The Company shall be responsible for and shall indemnify, defend and hold harmless the Contractor Group, against all import or export charges or customs or excise duties, taxes and fees including, without limitation, local sales taxes, VAT, clearing agents' fees or other similar taxes or fees which are levied on the Company Group Equipment or on the personal property of the Company Group Personnel.
- 12.4** The Contractor shall, and shall procure that the Subcontractors shall, report, file and pay any and all income, corporation, revenue or similar taxes, howsoever described, and all fines, penalties and interest thereon duly assessed on the income, profits and gains accruing to the Contractor or any Subcontractor in performance of the Contract. The Contractor shall defend, indemnify and hold harmless the Company Group from and against any and all Claims relating to taxation howsoever arising in connection with said income, profits and gains of the Contractor or any Subcontractor.

Contract Number: C-2770

- 12.5 The Contractor shall defend, indemnify and hold harmless the Company Group from and against all taxes assessed or levied against or on account of wages, salaries or other emoluments, income or deemed benefits paid to any member of the Contractor Group Personnel, or any social security payments payable in respect of the Contractor or any member of the Contractor Group Personnel.
- 12.6 Notwithstanding any other provision in the Contract, Company shall fully compensate Contractor for any and all costs, taxes, duties, imposts, dues, charges, fees, penalties, fines and any other form of assessment arising from or related to applicable rules, regulations, procedures, and/or enforcement practices of relevant authorities in relation to the Coastal and Inland Shipping (Cabotage Act) 2003 and the corresponding Guidelines for the implementation of the Cabotage Act. Notwithstanding the foregoing, Company's obligation to reimburse Contractor is limited to a maximum amount equal to two percent (2%) of the Drilling Unit Operating Rate over the Operational Period.

12.7 Withholding Tax

The Company may withhold sums from payments to be made by the Company to the Contractor or to any Subcontractor to the extent that such withholding may be required by Applicable Law, orders, rules or directions of any competent taxing authority. Unless otherwise specified, the rates and prices set forth in Schedule 6 are inclusive of any withholding taxes.

Notwithstanding any other provision to the contrary, if any withholding tax applies, Company shall furnish Contractor within ninety (90) days of such withholding, the official tax receipts or other reliable documentation (in a form acceptable to the appropriate authority in Nigeria) evidencing payment by Company of the amounts so withheld to the Nigerian Authorities.

If the Company fails to provide the Contractor within ninety (90) days of such withholding with all official withholding tax receipts or other credible evidence of such taxes withheld which is acceptable to the taxing authorities, and as a result the Contractor is unable to properly claim such withholding as a credit against its corporate income tax liability, the Contractor retains the right to separately invoice the Company for amounts so withheld, and the Company must pay such invoice within sixty (60) days of receipt or produce such original withholding tax receipt or other credible evidence of tax payment acceptable to the taxing authorities.

Where the requirement for any withholding is avoided by the Contractor or any Subcontractor holding an appropriate exception certificate it is the duty of the Contractor to inform the Company that such a certificate is held, prior to any payment being made, and to inform the Company of any change to or cancellation of the certificate and to provide copies of the certificate or any further information that may be required by the Company to satisfy it that it can avoid any withholding. The Contractor shall defend, indemnify and hold the Company Group harmless from and against any and all Claims arising in connection with such withholding or failure to withhold as may arise due to the Contractor's failure to inform the Company of any relevant matter in a timely fashion. The Company shall supply any certificate of such withholding as is required by law.

12.8 VAT

Unless otherwise specified, the rates, lump sums, prices and fees set forth in Schedule 6 are exclusive of VAT. To the extent that VAT is applicable to the amounts invoiced by Contractor, Contractor shall provide a separate standard VAT invoice with all additional

Contract Number: C-2770

forms and documentation currently required by the laws and regulations pertaining to said VAT. Upon receipt of such a correct and proper VAT invoice, Company shall pay the VAT in accordance with the Applicable Laws and regulations and provide the required receipt(s) to Contractor.

12.9 Reimbursements

In relation to any costs to be compensated by the Company on a reimbursable basis in accordance with this Contract, the Company shall have no liability to reimburse the Contractor for any portion of such costs which are eligible for tax relief, reduction, exemption or recovery by the actions of the Contractor or any Subcontractor.

- 12.10** If the fiscal system, customs/importation laws, tax laws, tax regulations, interpretation and enforcement of the foregoing or interpretations or practices of any government agency applicable in the Area of Operations change during the Firm Term of this Contract, plus any additional term(s), which cause a variation in any taxes, import duties, fees and charges assessed or levied against the Contractor, its personnel or equipment or otherwise relating to the Contract, the Company shall fully reimburse the Contractor for any increase in such taxes, duties, fees or other charges.

13. LIABILITIES AND INDEMNITIES**13.1 Interpretation**

Notwithstanding anything expressed or implied in this Contract to the contrary:

- (a) Where in this Contract a Party gives an indemnity, such indemnity shall extend to any and all liabilities, damages, charges, fines, penalties, costs and expenses incurred or payable in connection with or in consequence of the Claim including, but without limitation:
 - i) liabilities or damages, not excluding punitive or exemplary damages, admitted, determined or awarded or agreed in any settlement or compromise;
 - ii) charges, fines and penalties levied or imposed by any person or body having jurisdiction and power so to do; and
 - iii) reasonable and proper costs and expenses, including but without limitation legal costs and expenses on a full indemnity basis and the cost of the time spent on the Claim by the personnel of the indemnified Party, whether or not the Claim is successfully resisted or defended.
- (b) Where in this Contract a Party gives an indemnity, such indemnity shall extend, apply and be enforceable regardless of the cause or causes of the event giving rise to the Claim and in particular but without limitation, shall extend, apply and be enforceable notwithstanding that a cause or the cause may be:
 - i) the negligence of any degree (whether sole, contributory or gross), fault or default of;
 - ii) claim in tort, breach of contract (whether breach of condition or warranty), repudiation of contract or misrepresentation (whether innocent or negligent, but not fraudulent) by;

Contract Number: C-2770

- iii) any breach of duty (statutory or other and whether or not involving fault) or failure to comply with any Applicable Law on the part of the person or body so indemnified.
- (c) The indemnities given by the Company to the Contractor Group in this Contract may be enforced by the Contractor against the Company for the benefit of the Contractor Group and/or Contractor Group Personnel.
- (d) The indemnities given by the Contractor to the Company Group in this Contract may be enforced by the Company against the Contractor for the benefit of the Company Group and/or Company Group Personnel.
- (e) Where in this Contract a Party gives an indemnity, such indemnity shall extend, apply and be enforceable as a fundamental obligation of that Party without prejudice to any right whatsoever of any insurer or any right of any person who is not a Party.

13.2 Sickness, Disease, Injury or Death of Personnel

- (a) The Company shall save, indemnify, hold harmless and defend the Contractor Group and the Contractor Group Personnel against any and all Claims arising in respect of injury to or sickness, disease or death of any Company Group Personnel in relation to or in connection with this Contract.
- (b) The Contractor shall save, indemnify, hold harmless and defend the Company Group and the Company Group Personnel against any and all Claims arising in respect of injury to or sickness, disease or death of any Contractor Group Personnel in relation to or in connection with this Contract.

13.3 Physical Property

- (a) The Company shall save, indemnify, hold harmless and defend the Contractor Group and Contractor Group Personnel against any and all Claims in respect of:
 - (i) loss of or damage to physical property of the Company Group whether owned, hired, leased or otherwise provided by the Company Group; and
 - (ii) physical property of Company Group Personnel arising out of or in connection with this Contract.
- (b) The Contractor shall save, indemnify, hold harmless and defend the Company Group and the Company Group Personnel against any and all Claims in respect of:
 - (i) loss of or damage to physical property of the Contractor Group whether owned, hired, leased or otherwise provided by the Contractor Group; and
 - (ii) physical property of Contractor Group Personnel

arising out of or in connection with this Contract.

13.4 Contractor's Down-hole Equipment Below the Rotary Table

Contract Number: C-2770

- (a) Notwithstanding the provisions of Sections 13.1(b) and 13.3(b) and except to the extent of fair wear and tear, the Company shall be liable to the extent set out below in respect of loss of or damage to the Contractor Group's down-hole equipment (excluding blow-out preventors and associated equipment), arising out of or in connection with this Contract, when said down-hole equipment is in-hole below the rotary table except where any such loss or damage is caused by the negligence (statutory, contractual or otherwise) of the Contractor Group or Contractor Group Personnel.
- (b) Not Applicable
- (c) In the event that the Contractor makes a claim under this Section 13.4, the Contractor shall submit to the Company a fully documented request for reimbursement in accordance with any applicable provisions of this Contract together with independent third party supporting evidence for the amount of such claim.
- (d) The Company's liability under this Section 13.4 shall be limited to the lower of the following amounts:
 - (i) reasonable repair costs;
 - (ii) replacement purchase price depreciated at the rate of two percent (2%) per month from the date of original purchase to a maximum depreciation of fifty percent (50%); or
 - (iii) for any lost in hole charges specified in this Contract- depreciated at the rate of two percent (2%) per month from the date of this Contract to a maximum depreciation of fifty percent (50%).

13.5 Emergency Operations

- (a) Without prejudice to the provisions of this Section 13 and Section 14, at all times of emergency (including but not limited to a Well out of control) arising out of or in connection with this Contract, the Company may by notice request and in such event the Contractor shall permit the Company to assume control of any and all work necessary to contain and end such emergency pursuant to Section 8.7(f).
- (b) Throughout any such emergency, the Contractor shall make its personnel and physical property available as required by the Company, provided that the Contractor shall retain control of the marine functions of its vessels, including for this purpose and without limitation the Drilling Unit.

13.6 Well Damage, Blow-out, Crater and Associated Pollution

Notwithstanding anything contained elsewhere in the Contract to the contrary, but subject to Sections 13.2, 13.3 and 13.4, the Company shall save, indemnify, hold harmless and defend the Contractor Group and Contractor Group Personnel against any and all Claims in respect of:

- (i) loss of or damage to the Well, subterranean geological formation, strata and/or oil or gas reservoir;

Contract Number: C-2770

- (ii) loss of products from (i) above or resulting from a blow-out, crater, catching fire or the Well in any manner getting beyond control;
- (iii) killing or bringing under control of the Well;
- (iv) pollution, containment and clean-up resulting from Sections 13.6 (i), (ii) and (iii) above;
- (v) pollution, containment and clean-up if pollution emanating from the Company Group Equipment and any pollution wherever and howsoever arising or caused pursuant to Section 13.7 below;
- (vi) injury to or sickness, disease or death of any Third-Party person or loss of or damage to any property of a Third Party resulting from a blow-out, crater, catching fire or the Well in any manner getting beyond control

arising out of, relating to, or in connection with this Contract, save that notwithstanding Section 13.1(b):

- in the event that such loss or damage as set out in Section 13.6(i) is caused by the sole or substantially the sole negligence or wilful misconduct of Contractor Group or Contractor Group Personnel, the Contractor shall, at the request of the Company provided the Drilling Unit is still on the Well Location, either drill the same or an equivalent hole to the same depth as such hole had been previously drilled or repair such damaged hole or well to its original state at the Redrill Rate.

13.7 Pollution From Contractor Group Equipment

Subject to Section 13.6, the Contractor shall assume all responsibility for, including control and removal of, and shall indemnify, hold harmless and defend the Company Group against any and all Claims in respect of any pollution, contamination or waste matter emanating and originating from the Contractor Group Equipment.

13.8 Third Party

Subject to Sections 13.6(iv), 13.6(v) and 13.6(vi) all Claims in respect of injury to or sickness, disease or death of any Third Party person or loss of or damage to any property of a Third Party arising out of, relating to or in connection with this Contract shall, as between the Company and the Contractor, be borne in proportion to what their respective liabilities (if any) in the law of negligence are or would be in respect of the incident in question.

13.9 Liens

- (a) The Contractor shall not claim, and shall procure that no member of the Contractor Group shall claim, any lien, charge or the like on or over the Drilling Operations or on any property of the Company Group, including, but not limited, to any property of the Company Group which is within the control or possession of the Contractor Group or on or within the Area of Operations.
- (b) Upon receipt of a notice from the Company, the Contractor shall discharge or cause to be discharged all liens, charges or other encumbrances attaching to or upon any of the:

Contract Number: C-2770

- (i) Contractor Group Equipment; or
- (ii) (where such liens, charges or encumbrances have arisen as a result of the actions of any member of the Contractor Group) equipment provided by the Company Group for use for or in connection with the performance of the Drilling Operations

which, in either case, adversely affects the performance of the Contractor's obligations under this Contract.

- (c) The Contractor shall indemnify, hold harmless and defend the Company Group against any and all Claims, in respect of liens, charges or other encumbrances in connection with or arising out of the Contract.
- (d) If at any time there is evidence of any lien, attachment, charge or claim to which, if established, any member of the Company Group or its property might be subjected, whether made by any persons against the Contractor or made by any Subcontractor against the Company, then the Company shall have the right to withhold and/or set off or otherwise recover from the Contractor such sum of money as will fully indemnify the Company Group against any such lien, attachment, charge or claim.
- (e) Before withholding any payment due to the Contractor in accordance with Section 13.9(d), the Company shall give to the Contractor a reasonable opportunity to demonstrate that the purported lien, attachment, charge or claim is either fully discharged, unenforceable or is covered by a bond, an enforceable policy of insurance, or any other valid means of security.

13.10 Well Abandonment

Notwithstanding the provisions of Sections 13.1(b) and 13.6, if the Well has to be plugged and abandoned due to any member of the Contractor Group's or any member of the Contractor Group's Personnel's sole negligence or wilful misconduct whilst the Contractor is working on such Well, the Company may require the Contractor to drill a new Well in replacement at the same location or adjacent thereto at Redrill Rate, until the depth is reached of the original Well's abandonment.

13.11 Claims

If either Party becomes aware of any incident likely to give rise to a Claim, it shall notify the other Party as soon as practicable and both Parties shall co-operate fully in investigating the incident.

13.12 Salvage and General Average

Notwithstanding the provisions of Section 13.8, the Contractor shall indemnify, hold harmless and defend the Company Group and Company Group Personnel against any and all Claims in respect of injury to or sickness, disease or death of any Third Party person or loss of or damage to any property of a Third Party arising out of any salvage and rescue operations in respect of the Drilling Unit.

13.13 Contracts (Rights of Third Parties) Act 1999

Contract Number: C-2770

- 13.13.1 Subject to Section 13.13.3, the Parties intend that no provision of this Contract shall, by virtue of the Contracts (Rights of Third Parties) Act 1999 ("the Act") confer any benefit on, nor be enforceable by any person who is not a party to this Contract.
- 13.13.2 For the limited purpose of this Section 13.13 and notwithstanding the definition of Third Party under Section 1.1, "Third Party" shall mean any member of the Contractor Group (other than Contractor) or Company Group (other than Company).
- 13.13.3 Subject to the remaining provisions of this Contract, Sections 13, 14, 15, 18, and 27 are intended to be enforceable by a Third Party and by virtue of the Act.
- 13.13.4 Notwithstanding Section 13.13.3, this Contract may be rescinded, amended or varied by the Parties to this Agreement without notice to or the consent of any Third Party even if, as a result, that Third Party's right to enforce a term of this Contract may be varied or extinguished.
- 13.13.5 The rights of any Third Party under Section 13.13.3 shall be subject to the following:
- (i) any claim, or reliance on any term of this Contract by a Third Party against a Party to this Contract shall be notified in writing in accordance with the requirements of Section 23 by such Third Party to each Party to this Contract as soon as such Third Party becomes aware that an event is likely to give rise to such a claim and such notification shall contain the following information as a minimum:
 - (a) details of the occurrence giving rise to the claim; and
 - (b) the right relied upon by the Third Party under this Contract,
 - (c) the Third Party's written agreement to submit irrevocably to the jurisdiction of the English Courts in respect of all matters relating to such rights.
- 13.13.6 In enforcing any right to which it is entitled by virtue of the Act and the provisions of this Contract, the remedies of a Third Party shall be limited to the extent of damages.

14. CONSEQUENTIAL LOSS

14.1 For the purposes of this Section 14 the expression "Consequential Loss" shall mean:

- (i) consequential or indirect loss under English law; and
- (ii) Spread Costs, loss and/or deferral of production, loss of product, cost of or loss of use, loss of revenue, loss of or damage to the leasehold, loss of or delay in drilling or operating rights, profit or anticipated profit (if any), delay, business interruption and any other similar losses in each case whether direct or indirect to the extent that these are not included in (i), and whether or not foreseeable at the effective date of this Contract. For the purposes of this

Contract Number: C-2770

Section the term "Spread Costs" shall mean cost of or loss of use of property of Company Group and/or cost or loss of use of services provided by Company Group and/or cost of or loss of use of Company Group.

- 14.2 Notwithstanding any provision to the contrary elsewhere in the Contract and except to the extent of any agreed liquidated damages (including without limitation any predetermined termination fees) and payment rights and obligations of Company provided for in the Contract, the Company shall save, indemnify, defend and hold harmless the Contractor Group from the Company Group's own Consequential Loss and the Contractor shall save, indemnify, defend and hold harmless the Company Group from the Contractor Group's own Consequential Loss, arising from, relating to or in connection with the performance or non-performance of the Contract.

15. INSURANCE

15.1 Minimum Insurances

Without prejudice to the liabilities, indemnities and obligations of Contractor under Sections 13 and 14, the Contractor shall effect and maintain, and shall ensure that the Subcontractors shall effect and maintain, throughout the term of this Contract, insurance policies which shall include but shall not be limited to the minimum types and amounts set out in this Section 15. The Contractor shall indemnify, hold harmless and defend the Company Group against any and all excesses, deductibles or franchises incorporated therein. All insurance policies effected by the Contractor and the Subcontractors, except for Employer's Liability Insurance, shall name the Company and/or the Company Group as an additional assured to the extent of the liabilities and indemnities assumed by Contractor under Sections 13 and 14 respectively with cross liabilities provisions, where appropriate. Notwithstanding the foregoing, Contractor may elect to self insure any and all of the liabilities and indemnities assumed under Sections 13 and 14 respectively or procure such insurances with an affiliate insurance provider, provided that Company has consented and such consent has not been unreasonably withheld or delayed.

15.2 Certificates of Insurance

- (a) The Contractor shall provide the Company with certificates of insurance, endorsed by the Contractor's insurers or brokers, within seven (7) days of the effective date of this Contract, unless a current certificate has already been provided. Updated certificates will be provided on the renewal anniversary of all policies required hereunder.
- (b) Failure by the Contractor to provide such a certificate may be taken by the Company to indicate that the Contractor has failed to meet its obligations to provide the required insurance under this Contract.

15.3 Material Changes

The Contractor shall notify the Company promptly in the event of cancellation or material change affecting any insured party's interest in respect of the insurances set out in this Section 15.

15.4 Cancellation or Failure to Maintain

Contract Number: C-2770

Except for an event of Contractor electing to self insure under Section 15.1 above, if any insurance policy is cancelled or if the Contractor and/or the Contractor Group shall fail to effect or maintain any insurance policy which it is required to effect or maintain, such default shall be deemed a material breach under the terms of Section 21.3(a).

15.5 Waivers of Subrogation

To the extent of the indemnities and liabilities assumed by Contractor hereunder, all legal liability policies required under this Section 15 shall contain an agreement from the insurers to waive their rights of subrogation against the Company Group and Company Group Personnel.

15.6 Priority of Insurance

Contractor Group insurance policies required under this Section 15 shall be primary to any other insurance effected by Company Group and which may overlap in quantum and/or terms and conditions.

15.7 The Contractor's and Subcontractor's Minimum Insurance

The following are the minimum insurances which are required of the Contractor under Section 15.1:

- (a) Insurance in accordance with Workman's Compensation and Occupational Disease Laws to the full extent required by any laws in any jurisdiction in which the Drilling Operations are to be provided and/or contracts of employment for Contractor Group Personnel involved in the provision of the Drilling Operations are entered into;
- (b) Employer's Liability insurance for an amount required by Applicable Law but in no instance less than one and one half million Dollars (\$1,500,000.00) per person per occurrence or series of occurrences arising from the one event. Such insurance shall cover all Contractor Group Personnel;
- (c) General Third-Party insurance with a combined bodily injury and property damage limit of not less than ten million Dollars (\$10,000,000.00) per occurrence or series of occurrences arising from the one event;
- (d) Hull and Machinery insurance covering loss of or damage to vessels and/or jack-up barges, including but not limited to loss or damage arising from helicopter operations, War Risks (except if cancelled by Contractor's insurance underwriter in case of a War Risk situation), Riots, Strikes and Civil commotion, in amounts of not less than the insured value and Increased Value insurance of (combined total) for each vessel and/or jack-up barge owned, hired, chartered or borrowed under this or other agreements by the Contractor Group and used in connection with this Contract;
- (e) Protection and Indemnity (P&I) insurance or marine liability insurance equivalent to United Kingdom Mutual Steamship Association (Bermuda) Ltd rules, including Collision Liability and Sistership clauses, removal of wrecks and debris, pollution liability and Tower's Liability, with limits of not less than the insured value of each vessel and/or jack-up barge owned, hired, chartered or borrowed under this or any other agreements, by the Contractor Group and used in connection with this

Contract Number: C-2770

Contract. Also, excess P&I to give a combined limit of not less than fifty million Dollars (\$50,000,000.00) per occurrence or series of occurrence arising from the one event;

- (f) Aviation Liability insurance which shall cover aircraft (including helicopters) owned, hired, chartered or borrowed under this or other agreements, supplied by the Contractor Group and used in connection with this Contract, with a combined bodily injury and property damage limit, including passenger liability, of not less than fifty million Dollars (\$50,000,000.00) per occurrence or series of occurrence arising from the one event; and
- (g) Motor Vehicle Liability insurance, which shall comply with Applicable Law with respect to vehicles used in connection with this Contract.

The Contractor shall procure that the Subcontractors shall effect and maintain appropriate and applicable insurances.

16. FORCE MAJEURE

- 16.1 Except for the Company's obligation to pay money in accordance with this Contract, neither the Company nor the Contractor shall be responsible for any failure to fulfil any term or condition of the Contract if and to the extent that fulfilment has been delayed or temporarily prevented by a force majeure occurrence, as hereunder defined, which has been notified in accordance with this Section 16 and which is beyond the control and without the fault or negligence of the Party affected and which, by the exercise of reasonable diligence, the said Party is unable to provide against.
- 16.2 For the purposes of this Contract only the following occurrences shall be force majeure:
 - (a) Riot, war, invasion, act of foreign enemies, hostilities (whether war be declared or not), acts of terrorism, piracy, civil war, rebellion, revolution, insurrection of military or usurped power;
 - (b) Ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel or radio-active, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
 - (c) Pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
 - (d) Earthquake, flood, fire, explosion and/or other natural physical disaster, but excluding weather conditions as such, regardless of severity;
 - (e) Strikes at a national or regional level or industrial disputes at a national or regional level, or strikes or industrial disputes by labour not employed by the affected party its subcontractors or its suppliers and which affect a substantial or essential portion of the Drilling Operation; or
 - (f) Maritime or aviation disasters.
 - (g) Dispositions or order of governmental authority, whether such authority be actual

or assumed.

- 16.3 In the event of a force majeure occurrence, the Party that is or may be delayed in performing the Contract shall notify the other Party without delay giving the full particulars thereof and shall use all reasonable endeavours to remedy the situation without delay.

In the event of a force majeure occurrence the Force Majeure Rate shall be payable in accordance with the provisions of Schedule 6 – Compensation and the Firm Term shall be extended at Company's discretion, provided that such election to extend shall be exercised, and notice thereof given, within thirty (30) days after the Force Majeure event has abated.

- 16.4 Following notification of a force majeure occurrence in accordance with Section 16.3, the Company and Contractor shall meet without delay with a view to agreeing a mutually acceptable course of action to minimise any effects of such occurrence.

17. CONFIDENTIALITY

- 17.1 The Contractor shall, and shall ensure that each member of the Contractor Group and Contractor Group Personnel shall, treat as strictly confidential and shall not, without the Company's prior written consent, sell, trade, use, reproduce, copy, divulge or disclose to, place at the disposal of or use on behalf of any third party or, except to the extent necessary for performance hereunder, make use of any of the Company's proprietary technical information or of any other information about the Drilling Operations or the operations to which the Drilling Operations pertain.
- 17.2 The Contractor shall at no time without the prior written consent of the Company make any public releases or announcements concerning the subject matter of this Contract.
- 17.3 The provisions of this Section 17 shall not apply to any information which:
- (a) is lawfully in the Contractor's possession prior to the award of this Contract and which is not subject to any obligation of confidentiality owed to the Company; or
 - (b) is in the public domain through no breach of the obligations set out in this Section 17; or
 - (c) is received from a third party whose possession and right to disseminate such information is lawful and who is under no obligation not to disclose; or
 - (d) is required to be disclosed in order to comply with the requirements of any law, rule or regulation of any government, regulatory body having jurisdiction over the Area of Operations, or the Contractor or of any stock exchange on which the shares of a Contractor Group member are listed, provided the Contractor shall notify the Company of the requirement to make such disclosure prior to doing so.
- 17.4 The Contractor hereby acknowledges that any data, papers, documents, drawings, other printed or written matter, samples, computer software or equipment supplied to it by or on behalf of the Company Group to assist it in the performance of the Drilling Operations or any such items prepared by or on behalf of the Contractor in connection with the performance of the Drilling Operations are the sole and exclusive property of the Company and/or of any other member of the Company Group. The Contractor shall return to the Company all such items and all copies thereof within thirty (30) days after

Contract Number: C-2770

termination of this Contract upon written request. Contractor may retain one (1) set of copies of the IADC Daily Drilling Reports for its records.

- 17.5 The Contractor shall ensure that similar confidentiality provisions to this Section 17 are incorporated in any subcontract it enters into with any Subcontractor and that all Contractor Group Personnel shall comply with the same.
- 17.6 The Contractor acknowledges that any breach of the obligation of confidence contained in this Section 17 will result in unquantifiable loss to the Company and therefore, in the event of any such breach, will submit to an interlocutory injunction or give undertakings to the Court to prevent further breaches, without prejudice to the Company's rights to pursue other forms of relief. Any breach of this Section 17 will in any event be deemed to be a material breach of this Contract.

18. INTELLECTUAL PROPERTY RIGHTS AND PATENT INFRINGEMENTS

- 18.1 Neither the Company nor the Contractor shall have the right of use, other than for the purposes of the Contract, whether directly or indirectly, of any patent, copyright, proprietary right or confidential know how, trademark or process provided by the other party and the intellectual property rights in such shall remain with the party providing such patent, copyright, proprietary right or confidential know how, trademark or process.
- 18.2 Where any potential patent or registrable right in any country in the world results from developments by the Contractor which are based wholly on data, equipment, processes, substances and the like in the possession of the Contractor at the effective date of this Contract such rights shall vest in the Contractor.
- 18.3 Except as provided in Section 18.2, the Parties shall jointly seek patents or registrable rights in any country in the world on any item or idea arising out of or invented during the term of the Contract as a direct result of the Drilling Operation. The Parties agree to notify each other promptly of any potentially patentable or other registrable ideas conceived during the term of and as a direct result of working under the Contract. The Parties agree to co-operate in all efforts to obtain such patents or other registrable rights, and shall mutually agree, by means of a variation a reasonable allocation of the extra time and expense required to the Parties. The Parties agree to grant each other a royalty free licence either to use any patents or other registrable rights developed out of the Contract or to permit a subcontractor to manufacture or otherwise use the patents or other registrable rights for the ultimate use only of the respective Party.
- 18.4 Intentionally left blank.
- 18.5 The Contractor shall save, indemnify, defend and hold harmless the Company Group from all claims, losses, damages, costs (including legal costs), expenses and liabilities of every kind and nature for, or arising out of, any alleged infringement of any patent or proprietary or protected right arising out of or in connection with the performance of the obligations of the Contractor under the Contract except where such infringement necessarily arises from the Company's technical information and /or the Company's instructions.
- 18.6 The Company shall save, indemnify, defend and hold harmless the Contractor Group from all claims, losses, damages, costs (including legal costs), expenses and liabilities of every kind and nature for, or arising out of, any alleged infringement of any patent or proprietary or protected right arising out of or in

Contract Number: C-2770

connection with the performance of the obligations of the Company under the Contract or the use by the Contractor of technical information or materials or equipment supplied by the Company.

19. ASSIGNMENT AND SUBCONTRACTING

- 19.1 Subject to Section 19.3, neither Party may assign all or any part of this Contract, without the prior written consent of the other Party which will not be unreasonably withheld or delayed.
- 19.2 Except for an assignment to the Company no assignment by the Contractor shall relieve the Contractor or any member of the Contractor Group or any surety of any of the obligations or liabilities under this Contract prior to the date of the assignment
- 19.3 The Company is entitled to assign all or some of its rights or obligations under this Contract at any time and from time to time to any of its Affiliates, to any of the Co-Venturers and/or to any successor operator in the Area of Operations subject to the Contractor's consent which shall not unreasonably be withheld. The Company may assign the Contract or any part of it or any benefit or interest in or under it to any third party but only with the prior agreement of the Contractor.
- 19.4 The Contractor undertakes that, in the event of any assignment described in Section 19.3, it will execute without delay a formal assignment of interest in the Contract to the assignee, to be effective upon the written assumption by the assignee of all obligations of the Company under this Contract.
- 19.5 The Contractor shall not subcontract the whole of the Contractor subcontract any part of the Contract without the prior written consent of the Company.
- 19.6 Before entering into any subcontract under the Contract, the Company shall be given an adequate opportunity to review the form of the subcontract, the choice of the Subcontractor, the part of the Contract included in the subcontract and any other relevant details requested by the Company.
- 19.7 No subcontract shall bind or purport to bind any member of the Company Group. Nevertheless the Contractor shall ensure that any Subcontractor shall be bound by and observe the provisions of this Contract in so far as they apply to the subcontract.
- 19.8 Each subcontract shall expressly provide for the Contractor's unconditional right of assignment of the subcontract to the Company in the event that the Company terminates this Contract.
- 19.9 The Contractor shall be responsible for all work, acts, omissions and defaults of any Subcontractor as fully as if they were work, acts, omissions or defaults of the Contractor.

20. RECORDS AND AUDITS

- 20.1 The Contractor shall, and shall procure that the Subcontractors shall, maintain a true and correct set of records pertaining to all activities relating to their performance of this Contract and all transactions related thereto. The Contractor shall provide a copy of all Daily Drilling Reports on CD-rom format within thirty (30) days of the Completion Date.

Contract Number: C-2770

20.2 The Contractor shall, and shall procure that the Subcontractors shall, retain all such records for a period of not less than three (3) years after Completion Date or termination pursuant to Section 21, whichever is earlier.

20.3 During the term of this Contract and for a period ending three (3) years after Completion Date, the Company or its duly authorised representative shall have the right to audit at all reasonable times and, upon request, take copies of all of the Contractor's non confidential or non-privileged records (including data stored on computers), books, personnel records, accounts, correspondence, memoranda, receipts, vouchers and other papers of every kind relating to:

- (a) all invoiced charges made by the Contractor on the Company; and
- (b) any provision of this Contract under which the Contractor has obligations the performance of which is capable of being verified by audit

provided however that Company is not entitled in any event to investigate the make-up of rates and/or lump sum amounts expressed in the Contract.

21. TERMINATION AND AMENDMENT OF CONTRACT

21.1 Intentionally left blank.

21.2 If the Drilling Unit fails to initiate mobilization by the Scheduled Latest Mobilization Date, then the following provisions shall apply:

- (a) if the Drilling Unit initiates mobilization between June 16, 2014 and July 31, 2014, Company shall pay the Standby Rate during the Operational Period for the number of days the Drilling Unit's mobilization is delayed beyond 16 June 2014.
- (b) if the Drilling Unit initiates mobilization between August 1, 2014 and September 15, 2014, Company shall pay the Standby Rate for the first 45 days of Operational Period and then 50% of the Operating Rate from day 46 of the Operational Period for the number of days the Drilling Unit's mobilization is delayed beyond August 1, 2014.
- (c) if the Drilling Unit initiates mobilization on or after September 16, 2014, Company shall have the right to terminate the Contract.

At any time the Contractor believes the Drilling Unit may not be able to initiate mobilization by 15 September 2014, then Contractor shall immediately notify Company of such anticipated delay and a revised estimated mobilization date, in writing. The Company would be required to notify its intent to terminate or continue the Contract, no later than: (i) thirty (30) days after receipt of Contractor's notice between June 15th and August 31th, 2014; or (ii) fifteen (15) days after receipt of Contractor's notice between September 1st and September 15th, 2014.

In the event of termination under 21.2 (a), (b) and (c), Contractor shall reimburse Company upon request, any Mobilization Rate paid to Contractor, if applicable.

21.3 The Company may by giving notice to the Contractor terminate all or any part of this Contract at such times as the Company may consider necessary for any and all of the following reasons:

Contract Number: C-2770

- (a) if the Contractor is at any time in breach of any material obligations hereunder, including, but not limited to compliance with Schedule 10, and following receipt of a notice from Company that Contractor has failed to perform its obligations under the Contract in a diligent, skilful and workmanlike manner for reasons within Contractor's control, Contractor then:
 - (i) refuses to remedy; or within five (5) days either:
 - (ii) fails to commence to remedy; or
 - (iii) having commenced to remedy the matter(s) complained of, fails to proceed diligently to remedy the matter(s) complained of.
- (b) if the Contractor becomes insolvent;
- (c) if the Contractor becomes bankrupt or makes or attempts to make any composition or scheme of arrangement with its creditors or any of them, or, being a company or corporation, passes a resolution for winding up, or an order is made by the Court that the Contractor shall be wound up (other than a voluntary winding up for the purposes of amalgamation or reconstruction), or the Court shall make an administration order in respect of the Contractor, or a receiver or manager is appointed by the Court or the Contractor's creditors or any of them or the Contractor shall become subject to any of the circumstances which entitle the Court or any creditor to appoint a receiver or manager or which entitle the Court to make a winding up order or administration order in respect of the Contractor;
- (d) intentionally left blank
- (e) if a Force Majeure event prevails for a continuous uninterrupted period of thirty (30) days, Company has a right but not an obligation to terminate, subject to continued payment of the Force Majeure Rate in case of non-termination;
- (f) if a breakdown of the Contractor Group Equipment, unless caused by the actions of the Company, results in the Contractor being unable to perform its obligations hereunder for a period of ten (10) days consecutive or more;
- (g) if the Drilling Unit becomes an actual, constructive, arranged or compromised total loss, or is damaged to an extent to which, in the Company's sole opinion, it is unsafe for the Drilling Unit to continue to be used to perform the Drilling Operations;
- (h) at any time by giving the Contractor at least ten (10) days prior written notice. The Company may terminate this contract prior to the expiry of the nine hundred and twelve (912) day firm period from the Commencement Date and any extension of any such Firm Term, if applicable. In such an event by way of liquidated damages, but not as a penalty, the balance will be paid of the remaining of nine hundred and twelve (912) firm day period and any extension of any such Firm Term, if applicable as provided for in Section 10.7. Should termination occur prior to the Commencement Date it will be paid at the Standby Rate. In the event the Drilling Unit works for another customer during the remainder of the Firm Term or any agreed extension of such Firm Term, the liquidated damages will be adjusted accordingly as provided for in Section 10.7.

Contract Number: C-2770

- (i) if the Drilling Unit is lost to the Contractor through confiscation, nationalisation or seizure by the Government or any other authority claiming or having jurisdiction and the Drilling Operations is interrupted for more than ten (10) days.
- 21.4 In the event of the Company giving the Contractor notice of termination in accordance with Section 21.3 of all or any part of this Contract, the effective date of termination shall be the date specified in the notice, subject to such date complying with the above provisions regarding notice period. If the date specified does not comply with the above notice periods, or no date is specified, then the effective date of the termination shall be the earliest date that the notice can be effective in accordance with the above provisions. When a termination notice becomes effective, the Contractor shall immediately cease performance of the Drilling Operations or such part thereof as may be specified in the notice, and take such actions as the Company may require to protect the Well.
- 21.5 (a) In the event of termination of the Contract in accordance with Section 21.3 (a), (b), (c), (e) or (f) Contractor shall be entitled to payment as set out in Schedule 6 - Compensation for Work performed up to the date of termination, together with other sums due under this Contract and the Company shall pay the Contractor at zero rate plus the tow boats and fuel for the Drilling Unit and tow boats during the demobilisation of the Drilling Unit to the Demobilisation Point or equal distant location.
- (b) In the event of termination of the Contract in accordance with Section 21.3 (g) and (i) Contractor shall be entitled to payment as set out in Schedule 6 - Compensation for Work performed up to the date of termination, together with other sums due under this Contract.
- 21.6 a) Intentionally left blank
- b) In the event of termination under Section 21.3(h) or 21.8, the Contractor shall be entitled to payment as set out in Section 10.7.
- 21.7 In the event of termination under this Section 21 the Contractor shall not be relieved of any continuing obligations or liabilities under this Contract or at law.
- 21.8 In the event of Company's material breach of its financial obligations under the Contract which shall be deemed to include but not be limited to Company's failure or refusal to pay any undisputed invoice due in accordance with Sections 11.1(a) and 11.2(a) then Contractor shall have the right to terminate this Contract upon the expiry of ten (10) days prior written notice to Company of such material breach and Company's failure to remedy such breach within said ten (10) day period.
- 22. NOT USED**
- 23. NOTICES**
- 23.1 All notices and other communications provided for in this Contract hereunder shall be in writing. Wherever practicable, all such notices will be given by facsimile. Where this is not practicable, notices may be delivered by hand to an authorised representative of the Party to whom directed or shall be sent by registered airmail or (postage and charges prepaid) to the Parties at the following addresses, quoting the relevant Contract number.

Contract Number: C-2770

23.2 All notices herein provided to be given to the Company shall be addressed to:

xxx.

In case of technical/operational notices or issues, notices should be given to the Company at the following address:

xxx

23.3 All notices herein provided to be given to the Contractor shall be addressed to:

xxx

23.4 Unless otherwise provided herein, notices and other communications shall be deemed received as follows:

- (a) when given by hand, on the day of delivery provided such day is a Working Day and delivery is made at least one hour prior to close of business in recipient's office;
- (b) when given by registered airmail, on the seventh day following date of posting; and
- (c) when given by facsimile, on the day of transmission provided such day is a Working Day and transmission is made at least one hour prior to close of business in the recipient's office.

24. CO-VENTURERS

The Company enters into this Contract on behalf of itself and the Co-Venturers, the Company will carry out its operations on behalf of its Co-Venturers' and the Co-Venturer as the Operator of the Block and/or marginal field has full legal and regulatory approval and responsibility for the operations on the field, the Co-Venturer has the right and responsibility with all authorities in relation to the provisions and performance of this contract including but not limited the DPR NNPC NAPIMS and the Ministry of Petroleum but notwithstanding this:

- (a) the Contractor shall look only to the Company for the due performance of this Contract and nothing herein shall entitle the Contractor to commence any proceedings against any Co-Venturer other than the Company; and
- (b) the Company may enforce the Contract for and on behalf of all Co-Venturers as well as for itself. For that purpose the Company may assert any claim or commence any proceedings against the Contractor in its own name to enforce all obligations and liabilities of the Contractor and to make any claim which the Company and/or the Co-Venturers may have against the Contractor.

25. VARIATION

25.1 The Company may at any time by written notice require the Contractor to perform a Variation. Subject always to Contractor's agreement, the Contractor shall carry out such

Contract Number: C-2770

Variation as directed subject to the following provisions, and provided such Variation is within the Contractor's capability and any additional cost arising therefrom is to the Company's account.

25.2 The Company may instruct the Contractor to:

- (a) supply personnel or equipment not specified in Schedules 1a, 2, 3 and 4; and
- (b) make structural alterations to the Drilling Unit subject to the prior approval of the Contractor and the Contractor's insurance underwriters.

25.3 Where, in the opinion of the Contractor, a Variation given by the Company is likely to incur additional cost or prevent the Contractor from fulfilling any of its obligations under this Contract or may affect the Drilling Programme, it shall forthwith advise the Company and request it to notify the Contractor within forty-eight (48) hours, whether or not the Variation should be implemented.

25.4 In the event that the Parties agree that a Variation shall be compensated at reimbursable documented cost, then the handling charges specified in Schedule 6 shall apply.

26. OTHER CONDITIONS

General or special conditions in any of the Contractor's price lists, invoices, tickets, receipts or other documents presented to the Company or made a part of this Contract by reference are null and void.

27. COMPLIANCE WITH LAW

27.1 Contractor shall observe and abide by, and shall require all members of the Contractor Group and of the Contractor Group Personnel to observe and abide by, all Applicable Law anywhere and any local customs as may apply to the Area of Operations or in relation to the Contract including, without limitation those Applicable Laws, Regulations and local customs with reference to the certification of Contractor Group Equipment; and any regulations and decrees enacted thereunder; the manner of conducting operations (including but not limited to Employers' Liability, Workman's Compensation or similar statutory national insurance); and the provisions applicable to Contractor in any collective labour agreement or equivalent signed by Contractor.

The Contractor shall comply with all applicable laws, rules and regulations of any governmental or regulatory body having jurisdiction over the Contract and/or the Worksite and unless otherwise provided for in this Contract shall save, indemnify and hold harmless the Company Group from and against all fines and penalties assessed by a governmental authority against the Company resulting from the Contractor's failure to so comply.

27.2 Contractor recognises that any breach by any member of Contractor Group of any of the material provisions of this Section 27 will be considered a breach of a material obligation under Section 21.3 (a).

27.3 Contractor shall indemnify, defend and hold harmless Company Group against any penalty or other sanction or other Claims which may be imposed on any member of Company Group by the Government or any governmental authority, agency or body by reason of a proven violation by any member of the Contractor Group or Contractor

Contract Number: C-2770

Group Personnel of any restriction or any failure to comply with any of the foregoing provisions of this Section 27.

- 27.4 Should the Contractor experience an increase or decrease in its costs due to changes in Applicable Laws and regulations (including HSE Safety Notices, Guidelines, Guidance Notes, Classification Society Rules and other like documents under which the Contractor is subject to compliance) including a change in the manner of enforcement or interpretation thereof, or any changes to the Drilling Unit's VSSC pursuant to the Company's instructions or required for the Company's locations, any of which became effective after the effective date of the Contract then the rates and fees shall be increased or decreased as applicable to fully account for such change in costs.
- 27.5 The Contractor shall obtain all licenses, permits, temporary permits and authorizations required by the Applicable Laws, rule and regulations for the performance of the Contract, save to the extent that the same can only be legally obtained by the Company.

28. PERMITS AND LICENCES

Subject to Section 9.2 and unless otherwise specified herein, Contractor shall obtain at its own cost from the appropriate authorities all necessary permits and licences required by Applicable Law for the performance of the Contract. Company shall provide all necessary assistance but Company shall in no circumstances be responsible for any failure of Contractor to obtain any such permit or licence and unless otherwise provided for in this Contract for any consequence of such failure.

Contractor shall obtain and provide at its own expense all visas, passport, working permits, exit and re-entry permits and all other governmental authorisations or documentation required in connection with the entry, presence, employment and/or exit of Contractor Group Personnel. This documentation must be valid during the term of the Contract.

29. INDEPENDENT CONTRACTOR

The Contractor shall act as an independent contractor with respect to the Contract. All personnel assigned to the Contract shall be the Contractor's employees or Subcontractors or employees of Subcontractors and shall not be or deemed to be employees of the Company.

30. WAIVER

None of the provisions of this Contract shall be considered waived by the Parties unless such waiver is given in writing by a Party. No such waiver shall be a waiver of any past or future default, breach or modification of any of the terms, provisions, conditions or covenants of this Contract unless expressly set forth in such waiver. Nor shall any delay or omission on the part of a Party in exercising or availing itself of its rights hereunder constitute a waiver of such right.

31. BUSINESS STANDARDS

- 31.1 The Contractor, in performing its obligations under this Contract, shall comply with all Anti-Corruption Laws, to the extent applicable to the Contractor or the Company Group and shall establish and maintain appropriate business standards, procedures and controls including those necessary to avoid any real or apparent impropriety or adverse impact on the interests of the Company Group and the Company Group Personnel. The

Contract Number: C-2770

Company reserves the right to review such standards and procedures prior to commencement of, and during the Drilling Operations.

For purposes of this Section 31, Anti-Corruption Laws means any Law or other rule or regulation of any governmental authority that has jurisdiction over the issue in question, or any other legislative executive or administrative action of a governmental authority, or a final agreement judgment award, or court order that relates to the performance of this Contract, or to the interpretation or application of this Contract, and includes all Laws to the extent applicable, or (i) Nigeria or the country where services are being provided hereunder; (ii) the United States of America, including the United States Foreign Corrupt Practices Act of 1977 ("FCPA"); (iii) the UK Bribery Act of 2010 ("UK Bribery Act"); and (iv) the country of formation and principal place of business of the Contractor; as any of the foregoing may be amended from time to time.

- 31.2 The Contractor shall review with the Company, on a regular and frequent basis during the term of this Contract, the Contractor's business practices, standards, procedures and controls, including, without limitation, those related to the:
- (a) activities of the Contractor Group and Contractor Group Personnel;
 - (b) avoidance of any conflict of interest; and
 - (c) giving of gifts, entertainment, bribes or favours of any kind in contravention of the FCPA and UK Bribery Act (collectively the "Anti-bribery Acts").
- 31.3 The Contractor represents to the Company that all financial statements, reports and billings rendered to the Company under this Contract shall properly reflect the facts of all activities and transactions handled for the Company's account and Contractor acknowledges that same may be relied upon by Company as being complete and accurate in any further recording or reporting made by the Company for any purpose.
- 31.4 The Contractor shall notify the Company in writing promptly upon discovery of any failure to comply with this Section 31.
- 31.5 The Contractor shall conduct its business in accordance with all Applicable Laws prevailing in the Area of Operations and the Anti-bribery Acts to reflect a high standard of ethics in all its business transactions and to avoid any unlawful or unethical intervention in the political or other affairs of any country. In this regard Contractor shall not, nor permit:
- (a) to make any contributions, gifts or other incentive directly or indirectly, to any political party or candidate in connection with any election campaign for any government office unless such contribution is lawful;
 - (b) to make any contributions, gifts or other incentive to any foreign political party, committee or candidate for public office unless such contribution is lawful in the country where it was made and does not contravene the Anti-bribery Acts;
 - (c) to make any payment, gift, commission, fee, rebate or other incentive shall be made to or for the benefit of any supplier, customer, government or public official or other business associate of the Company which could reasonably be interpreted as being for the purpose of improperly influencing, inducing or facilitating a business or administrative decision of such supplier, customer, government or public official or other business associate and which contravenes relevant provisions of the Acts; and

Contract Number: C-2770

- (d) the Contractor shall not pay any commissions, fees, nor grant any rebates or incentives to any employee or officer of the Company or of any Contractor's Subcontractor, nor favour said persons with gifts, bribes or entertainment of significant or substantial value, nor enter into any business arrangements with employees or officers of the Company other than with authorized representatives of the Company who are acting on behalf of the Company in compliance with the Anti-bribery Acts. The Contractor shall report in writing to the Company any solicitation of commissions, fees or rebates received in connection with this Contract.

31.6 Without limiting the generality of this Section 31, each Party understands the purposes of the Anti-bribery. UK Anti-Corruption Legislation means the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916 and the Anti-terrorism, Crime and Security Act 2001, Part 12 and UK Bribery Act 2010 any other similar legislation in force at the date of this Contract. Each Party agrees that in carrying out the intent of this Contract, it shall strictly comply with the substance of the FCPA, the UK Anti-Corruption Legislation and any other similar laws and shall not take any action or permit any of its Affiliates or agents to take any action that would violate the substance of the FCPA, the UK Anti-Corruption Legislation or such other similar laws.

31.7 Contractor, on behalf of Contractor and Contractor's Group, warrants, on behalf of Contractor Group, that the members of Contractor Group:

- (a) are not government officials nor are they affiliated with any government official
- (b) understand the FCPA and the UK Anti-Corruption Legislations (collectively the "Acts") Anti-bribery Acts, including any additional amendments thereof
- (c) have not and will not engage in conduct that would violate the Anti-bribery Acts if they had been subject to either of them.
- (d) will not cause the Company to violate either of the Anti-bribery Acts.

32. LOCAL CONTENT

In order to support the Government's policy, Contractor shall in performing the Contract give preference to goods and services sourced from Nigeria provided these are competitive in quality, price and time of delivery.

Subject to the provisions of Section 27, the Contractor shall comply at its sole cost and expense with any and all Applicable Laws.

33. GOVERNING LAW

This Contract shall be governed by, interpreted and construed in accordance with the laws of England. The courts of England shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Contract.

34. SURVIVAL

The provision in this Section 34 and Sections 1, 12, 13, 14, 15, 17, 18, 20, 21.7, 22, 23, 27, 31, 33 and 36 shall independently and severally survive the expiry and termination of

Contract Number: C-2770

this Contract for any reason whatsoever, including repudiation, of all or any part of this Contract.

35. DRILLING UNIT SECURITY

A security assessment of the Drilling Unit taking into consideration all aspects of the locations of the wells will be undertaken by Control Risks Limited acting as an independent security advisor to both Parties. The measures recommended by Control Risks Limited shall be reviewed by both Parties and any recommendations agreed by both Parties shall be implemented at the cost and expense of Company. Company shall not unreasonably withhold its consent to the implementation of any recommendation considered beneficial to the security of the Drilling Unit and requested by Contractor.

36. ENTIRE AGREEMENT

This Contract contains the entire agreement between the Parties in relation to the subject matter hereof and, in the absence of fraud, supersedes any previous understandings, commitments, agreement or representations whatsoever, oral or written (including, for the avoidance of doubt, Contractor's standard terms of sale, service or supply, its price lists, estimates, quotations and work tickets). This Contract shall not be varied except by any instrument in writing executed by the duly authorised representatives of both Parties.

IN WITNESS WHEREOF the Parties hereto have caused this Contract to be executed in two (2) original texts on the date first above mentioned.

Signed for and on behalf of:
XXXX

Signed for and on behalf of:
XXXX

Signature:_____

Signature:_____

Name (Printed):_____

Name (Printed) _____

Position:_____

Position: _____

BIBLIOGRAPHY

- AADNOY, B. S. 2010. *Modern Well Design*, Rotterdam, Netherlands, CRC Press.
- ADAMS, J. 1995. *Risk*, London, London: UCL Press.
- ADAMS, K. 2012. Revisiting “Indemnify”. *Adams on Contract Drafting* [Online]. Available from: <http://www.adamsdrafting.com/revisiting-indemnify/>; accessed 20 February 2017.
- ADVISOR, N. H. Difference Between Hazard and Risk.
- AGUILAR, F. J. 1967. *Scanning the Business Environment*, Macmillan.
- ALBION, M. S. 2008. *More Than Money: Questions Every MBA Needs to Answer: Redefining Risk and Reward for a Life of Purpose*, San Francisco, Berrett-Koehler Publishers.
- ALMEIDA, R. 2014. *Transocean Cleared from Deepwater Horizon Blowout Liability* [Online]. USA: gCaptain. Available: <http://gcaptain.com/transocean-cleared-deepwater-horizon-blowout-liability/>; accessed 2 November 2017.
- ALON, I. & MCKEE, D. 1999. Towards a Macro Environmental Model of International Franchising. *Multinational Business Review*, 7, 76.
- ALTHAUS, C. E. 2005. A Disciplinary Perspective on the Epistemological Status of Risk. *Risk Analysis*, 25, 567-588.
- ANDERSON, B. F. 1981. *Concepts in Judgement and Decision Research: Definitions, Sources, Interrelations, Comments*, Praeger Publishers.
- ANDERSON, O. L. 1989. The Anatomy of an Oil and Gas Drilling Contract. *Tulsa LJ*, 25, 359-533.
- ANDERSON, R. 2008. “Certificates of Insurance” and “Additional Insured” Coverage - Maximize Value and Avoid Pitfalls. *The John Liner Review*, 22, 87 - 91.
- ANDRADE, M. M. 2011. Knock for Knock Indemnities: Contract Practices and Enforceability Issues. *Oil, Gas & Energy Law Intelligence*, 9.
- ANSON, W. R., BEATSON, J., BURROWS, A. S. & CARTWRIGHT, J. 2010. *Anson's Law of Contract*, Oxford University Press.
- ARROW, K. J. 1992. Insurance, Risk and Resource Allocation. *Foundations of Insurance Economics*. Springer.
- ATIAH, P. S. 1979. *The Rise and Fall of Freedom of Contract*, Oxford University Press.
- ATIAH, P. S. 1990. *Essays on Contract*, Oxford University Press.
- AUBIN, Y. & PORTWOOD, T. 2001. Mutual Indemnity and Hold Harmless Agreements.

International Business Law Journal, 671 - 698.

AUSTEN-BAKER, R. 2017. *Implied Terms in English Contract Law*, Edward Elgar Publishing.

AUSTRALIA, K. Understanding and Articulating Risk Appetite. (Advisory Paper, 2008).

BACHMANN, C. F. 1961. Shifting Risks through Insurance and Hold-Harmless Agreements. *Ins. Counsel J.*, 28, 617.

BAGCHI, A. 2014. Distributive Justice and Contract. In: KLASS, G., LETSAS, G. & SAPRAI, P. (eds.) *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW*. U.K.: Oxford University Press.

BAILY, J., NITEK, D. & FAIRFIELD, G. 2016. Defining Your Liability in Advance: Liquidated Damages, Limitation and Exclusion Clauses. *Contract Disputes Practical Guides* [Online]. Available:

<file:///C:/Users/user/Dropbox/PhD%20Program/KCM%20DOWNLOADS/DEFINING%20YOUR%20LIABILITY%20IN%20ADVANCE.pdf> ; accessed 17 June 2016.

BANAKAS, S. 2009. Voluntary Assumption of Tort Liability in English Law: A Paradox? 12 Apr 2011 ed. UK: University of East Anglia.

BARNHIZER, D. D. 2005. Inequality of Bargaining Power. *U. Colo. L. Rev.*, 76, 139-242.

BEALE, H. 1978. Unfair Contract Terms Act 1977. *Brit. JL & Soc'y*, 5, 114.

BENTKOVER, J. D., COVELLO, V. T. & MUMPOWER, J. 2012. *Benefits Assessment: The State of the Art*, Springer Science & Business Media.

BENTLY, L. & SHERMAN, B. 2014. *Intellectual Property Law, 4th Edition*, Oxford University Press, USA.

BERNOULLI, J. 1713. *Ars conjectandi*, Impensis Thurnisiorum, fratrum.

BISHOP, J. W. J. 1967. Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers. *Yale L.J.*, 77, 1078-1103.

BLACK, A. J. & DUNDAS, H. R. 1992. Joint Operating Agreements: An International Comparison from Petroleum Law. *J. Nat. Resources & Env'tl. L.*, 8, 49-79.

BLUMER, H. 1931. Science Without Concepts. *American Journal of Sociology*, 36, 515-533.

BOARDMAN, M. E. 2005. Contra Proferentem: The Allure of Ambiguous Boilerplate. *Mich. L. Rev.*, 104, 1105.

BOYLE, A. 2011. *International Law and the Liability for Catastrophic Environmental Damage: Introductory Remarks*.

BRIDGE, M. The Contracts (Rights of Third Parties) Act 1999 (2001). *Edinburgh L Rev*, 5, 85.

BUCKLEY, R. 1981. *The Law of Nuisance*. Butterworths.

- BURKE, J. 1991. *Chances: The Probability Factors of Life*, London: Virgin Books.
- BURKE, M. P., NICHOLAS 2010. *Risk versus Reward Capital Markets: Indonesia Dispute Resolution*.
- BURROWS, A. (1996) 'Reforming Privity of Contract: Law Commission Report No. 242', *Lloyds Maritime And Commercial Law Quarterly*, pp. 467– 486.
- BURROWS, A. 1998. *Understanding the Law of Obligations – Essays on Contract, Tort and Restitution*, Oxford, England, Hart Publishing.
- BURROWS, A. 2000. *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*, Bloomsbury Publishing.
- BURROWS, A. 2016. *A Casebook on Contract*, UK, Hart Publishing.
- BURROWS, A., PEEL, E. E. & CHEN-WISHART, M. 2010. A Bird in the Hand: Consideration and Contract Modifications. In: BURROWS, A. S. & PEEL, E. (eds) *Contract Formation and Parties*. Oxford: Oxford University Press.
- CAMERON, P. 2012. Liability for Catastrophic Risk in the Oil and Gas Industry. *International Energy Law Review*, 6, 207-219.
- CAMERON, P. D. 2012. Liability for Catastrophic Risk in the Oil and Gas Industry. *International Energy Law Review*, 6, 207-219.
- CANE, P. 1991. *Tort Law and Economic Interests*, Clarendon Press.
- CANNON, N. 2014. *Best Endeavours, All Reasonable Endeavours and Reasonable Endeavours* [Online]. London: Walker Morris. Available: <https://www.walkermorris.co.uk/publications/brief-february-2014/best-endeavours-all-reasonable-endeavours-and-reasonable-endeavours/#>; accessed 17 January 2018.
- CARLSSON, O. 2014. To Accept, or Not to Accept: Things to Consider When Building a Risk Acceptance Strategy. *Outpost24* [Online]. Available from: <http://blog.outpost24.com/2014/02/20/risk-acceptance/>; accessed 11 March 2016.
- CENTER, P.-P.-P. I. I. R. 2016. *Change of Law – Checklist and Sample Wording* [Online]. New York: The World Bank Group. Available: <https://ppp.worldbank.org/public-private-partnership/overview/practical-tools/checklists/change-of-law>; accessed 25 January 2018.
- CHALMERS, M. D. E. S. & OWEN, D. 1907. *The Marine Insurance Act, 1906*, London: W. Clowes.
- CHARLTON, P. 2010. Risk and Reward. *Climbing - Philosophy for Everyone*. Wiley-Blackwell.
- CHOPRA, S. & SODHI, M. S. 2004. Managing Risk to Avoid Supply-Chain Breakdown. *MIT Sloan Management Review*, 46, 53-62.

- CIBINIC, J., NASH, R. C. & NAGLE, J. F. 2006. *Administration of Government Contracts*, Washington, D C; Chicago, IL, George Washington University, National Law Center, Government Contracts Program; Wolters Kluwer/CCH.
- CLARKE, L. & SHORT JR, J. F. 1993. Social Organization and Risk: Some Current Controversies. *Annual Review of Sociology*, 375-399.
- CNA. 2006. Risk Transfer: A Strategy to Help Protect Your Business. Available: https://www.cna.com/web/wcm/connect/b7bacbf0-b432-4e0c-97fa-ce8730b329d5/RC_Guide_RiskTransferStrategytoHelpProtectYou+Business_CNA.pdf?MOD=AJPERES; accessed 12 March 2016.
- COATES, J., C. IV 2012. Allocating Risk Through Contract: Evidence from M&A and Policy Implications. *Available at SSRN 2133343*.
- COLE, B. M. (1969-1970). Misrepresentation in Public Contracts: Allocating the Risk of Loss. *Syracuse Law Review* 21, 1004-1025.
- COLE, L. A. 1994. *Element of Risk: The Politics of Radon*, Oxford University Press.
- COLEMAN, J. L. 1992. *Risks and Wrongs*, CUP Archive.
- COMMERCE, O. O. G. 2002. Principles for Service Contracts: Contract Management Guidelines.
- COMMISSION, L. 1991. *Privity of Contract: Contracts for the Benefits of Third Parties*, HM Stationery Office.
- COMMITTEE, B. 2011. Principles for the Sound Management of Operational Risk. *Basel, Switzerland: Bank for International Settlements Communications*.
- COMMITTEE, P. S. A Guide to the Project Management Body of Knowledge. 1996. Project Management Institute.
- CONAWAY, C. F. 1999. *The Petroleum Industry: A Nontechnical Guide*, Tulsa, Okla., Tulsa, Oklahoma: PennWell.
- CONGRESS, T. U. What Is the Difference Between A Hazard and A Risk?
- CONWAY, F. X. 1941. Damages for Shortened Life. *Fordham L. Rev.*, 10, 219.
- COOKE, J. 2015. *Law of Tort*, U.K., Pearson Education Limited.
- COOPER, R. & JOHN, A. A. 2012. Theory and Applications of Economics (v. 1.0).
- CORTS, K. 2000. Turnkey Contracts as a Response to Incentive Problems: Evidence from the Offshore Drilling Industry. *Unpublished working paper, Harvard University*.
- COUNCIL, S. 2014. Environmental Offences: Definitive Guidelines. *Londres, Royaume-Uni: Sentencing Council*.

- DANIELSSON, J., SHIN, H. S., ZIGRAND, J.-P. & EQUITY, A. 2010. *Risk Appetite and Endogenous Risk*, Financial Markets Group.
- DE SMITH, S. A. & EVANS, J. 1980. *De Smith's Judicial Review of Administrative Action*, 4th Edition, London, Books.
- DEAKIN, S., JOHNSTON, A. & MARKESINIS, B. 2012. *Markesinis and Deakin's Tort Law*, Oxford University Press.
- DECLERCQ, P. J. M. 1995. Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability. *J.L. & Com.*, 15, 213-256.
- DECLERCQ, P. J. M. 1995. Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability. *J.L. & Com.*, 15, 213-256.
- DENNEY, D. 2005. *Risk and Society*, Sage.
- DIAMOND, P. A. 1974. Posner's Economic Analysis of Law. *The Bell Journal of Economics and Management Science*, 5, 294-300.
- DIONNE, G. (ed.) 2013. *Handbook of Insurance*, New York: Springer Science+Business Media.
- DOUGLAS, W. O. 1929. Vicarious Liability and Administration of Risk I. *The Yale Law Journal*, 38, 584-604.
- DOWRICK, F. E. 1954. The Relationship of Principal and Agent. *The Modern Law Review*, 17, 24-40.
- DRAETTA, U. 1996. Force Majeure Clauses in International Trade Practice. *Int'l Bus. L.J.*, 1996, 547-560.
- EISENBERG, M. A. 1997. Probability and Chance in Contract Law. *UCLA L. Rev.*, 45, 1005.
- EISENBERG, M. A. 1998. Probability and Chance in Contract Law. *UCLA Law Review*, 45, 1005-1006.
- (ENISA), E. U. A. F. N. A. I. S. *Risk Management* [Online]. ENISA. Available: <https://www.enisa.europa.eu/activities/risk-management/current-risk/risk-management-inventory/rm-process/risk-acceptance>; accessed 11 March 2016.
- ERNST&YOUNG. 2016. *Legal Risk 2.0: Show You're in Control* [Online]. Online: EYGM Limited. Available: [http://www.ey.com/Publication/vwLUAssets/ey-legal-risk-2-show-you-are-in-control/\\$FILE/ey-legal-risk-2-show-you-are-in-control.pdf](http://www.ey.com/Publication/vwLUAssets/ey-legal-risk-2-show-you-are-in-control/$FILE/ey-legal-risk-2-show-you-are-in-control.pdf); accessed 6 December 2017.
- EWALD, F. 1991. Insurance and Risk. *The Foucault effect: Studies in governmentality*, 197, 202.
- FARBER, D. A. 1987. Legal Pragmatism and the Constitution. *Minn. L. Rev.*, 72, 1331.
- FARBER, D. A. 2005. The Story of Boomer: Pollution and the Common Law. *Ecology LQ*, 32,

113.

FARUQUE, A. A. 2011. *Petroleum Contracts: Stability and Risk Management in Developing Countries*, Dhaka, Bangladesh, Bangladesh Institute of Law and International Affairs (BILIA).

FERGUSON, E., FARRELL, K., LOWE, K. C. & JAMES, V. 2001. Perception of Risk of Blood Transfusion: Knowledge, Group Membership and Perceived Control. *Transfusion Medicine*, 11, 129-135.

FISCHHOFF, B. & LICHTENSTEIN, S. 1984. *Acceptable Risk*, Cambridge University Press.

FLEISCHER, C. A. 1976. Liability for Oil Pollution Damage Resulting from Offshore Operations. *Scandinavian Stud. L.*, 20, 105-144.

FOLLOWS, T. J. 1983. *The Supply of Goods and Services Act 1982*; 13 Kingston L. Rev. 34 1983.

FOSTER, S. J., GIBBIE, K. W., MASON, D. C. & BARON, S. L. Risks Assumed in Drilling Contracts: Global Comparison and Case Histories. SPE/IADC Drilling Conference, 2003. Society of Petroleum Engineers.

FRANKLIN, H. 2005. Irretrievable Breakdown? A Review of Operator/Contractor Relationships in the Offshore Oil and Gas Industry. *Journal of Energy & Natural Resources Law*, 23, 1-14.

FRIED, C. 2015. *Contract as Promise: A Theory of Contractual Obligation*, Oxford University Press, USA.

FRIEDMAN, D. 1982. What is 'Fair Compensation' for Death or Injury? *International Review of Law and Economics*, 2, 81-93.

FURMSTON, M. P., CHESHIRE, G. C. & FIFOOT, C. H. S. 2012. *Cheshire, Fifoot and Furmston's Law of Contract*, Oxford University Press.

GARNER, B. A. & BLACK, H. C. 2004. *Black's Law Dictionary*, St. Paul, MN: Thomson/West.

GIBBS, P., HANLON, M., HARDAKER, P., HAWKINS, E., MACDONALD, A., MASKELL, K., MAYFIELD, H., MCLEAN, A., MORRIS, E. & MYLNE, K. 2013. Making Sense of Uncertainty: Why Uncertainty is Part of Science.

GILBLOM, K. & JORDAN, A. 2018. BP's \$60 Billion Gulf Spill Tab Rises as Lawsuits Wind Down *Bloomberg Quint* [Online]. Available: <https://www.bloombergquint.com/business/2018/01/16/bp-takes-1-7-billion-charge-on-deepwater-horizon-claims-closure> accessed 21 January 2018.

GILLETTE, C. P. 1990. Commercial Relationships and the Selection of Default Rules for Remote Risks. *The Journal of Legal Studies*, 19, 535-581.

GILLETTE, C. P. & KRIER, J. E. 1990. Risk, Courts, and Agencies. *University of Pennsylvania Law Review*, 138, 1027-1109.

- GORDON, G. 2011. Contribution, Indemnification and Exclusion: Farstad in the Supreme Court. *Edinburgh L. Rev.*, 15, 259.
- GORDON, G. 2011. Risk Allocation in Oil and Gas Contracts (Chapter 14). In: GORDON, G., PATERSON, J. & USENMEZ, E. (eds) *Oil and Gas Law: Current Practice and Emerging Trends*. Dundee: Dundee University Press.
- GOUDKAMP, J. & NOLAN, D. 2017. Contributory negligence in the Court of Appeal: an empirical study. *Legal Studies*.
- GOUNARI, Z. 2002. Duties and Liabilities of the Operator under UK Oil and Gas Joint Operating Agreements: Is the Operator a Fiduciary? *Oil, Gas & Energy Law Journal (OGEL) Archive Issue*.
- GOVERNMENT, Q. 2016. *What is an Information Technology Risk?* [Online]. Online: Queensland Government. Available: <https://www.business.qld.gov.au/running-business/protecting-business/risk-management/it-risk-management/defined> accessed 6 December 2017.
- GOVERNMENT, U. 2013. Planning Practice Guidance for Onshore Oil and Gas. London, UK: Department for Communities and Local Government.
- GREEN, M. 2010. *Transocean: Insurers Have Already Paid \$401 Million for Deepwater Horizon Loss* [Online]. USA: InsuranceNewsNet. Available: <https://insurancenewsnet.com/oarticle/Transocean-Insurers-Have-Already-Paid-401-Million-for-Deepwater-Horizon-Loss-a-188498#.Wfp6CGaDPIU>; accessed 2 November 2017.
- GROUP, D. H. S. 2011. Final Report on the Investigation of the Macondo Well Blowout. *Center for Catastrophic Risk Management, University of California at Berkeley*.
- GROUP, R. S. S. 1992. *Risk: Analysis, Perception and Management*.
- GWYN, A. H. & DAVIS, P. E. 2003. Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law. *Constr. Law.*, 23, 26.
- HALPERN, S. W. 1986. Application of the Doctrine of Commercial Impracticability: Searching for the Wisdom of Solomon. *U. Pa. L. Rev.*, 135, 1123-1178.
- HARRISON, E. F. 1999. *The Managerial Decision-Making Process*, Houghton Mifflin College Div.
- HARTMAN, F. & SNELGROVE, P. 1996. Risk Allocation in Lump-sum Contracts - Concept of Latent Dispute. *Journal of construction engineering and management*, 122, 291-296.
- HEARN, B. 2004 Allocating and Managing Procurement Risks In: PROCUREMENT, T. C. I. S. L. B. G. T. P. (ed.). Toronto, Canada: McMillan Binch LLP.
- HERRERA, M. 2013. FOUR TYPES OF RISK MITIGATION AND BCM GOVERNANCE, RISK AND COMPLIANCE (GRC). *MHA Consulting* [Online]. Available from:

<http://www.mha-it.com/2013/05/four-types-of-risk-mitigation/> accessed 13 March 2016.

HERRING, R. & KUBLER, F. 1994. Allocation of Risk in Cross--Border Deposit Transactions. *Northwestern University Law Review*, 89, 942-1028.

HEUSTON, R. F. V. & BUCKLEY, R. A. 1996. *Salmond and Heuston on the Law of Torts*, Sweet & Maxwell.

HEWITT, T. 2008. Who is to Blame? Allocating Liability in Upstream Project Contracts. *Journal of Energy & Natural Resources Law*, 26, 177-206.

HILL, M. & VARONE, F. 2014. *The Public Policy Process*, Routledge.

HILLSON, D. & SIMON, P. 2012. *Practical Project Risk Management: The ATOM Methodology*, Management Concepts Inc.

HOOD, C., ROTHSTEIN, H. & BALDWIN, R. 2001. *The Government of Risk: Understanding Risk Regulation Regimes*, Oxford University Press.

HOOLEY, R. 2013. Controlling Contractual Discretion. *The Cambridge Law Journal*, 72, 65-90.

HOUSTON, C. E. & SUNSTEIN, C. R. 1998. Risk Assessment, Resource Allocation, and Fairness: Evidence from Law Students. *J. Legal Educ.*, 48, 496 - 523.

HOWARTH, D., MATTHEWS, M., MORGAN, J., O'SULLIVAN, J. & TOFARIS, S. 2016. *Hepple and Matthews' Tort Law: Cases and Materials*, Bloomsbury Publishing.

HUBER, P. 1985. Safety and the Second Best: The Hazards of Public Risk Management in the Courts. *Columbia Law Review*, 85, 277.

HYNE, N. J. 2001. *Nontechnical Guide to Petroleum Geology, Exploration, Drilling, and Production*, Tulsa, Okla., Tulsa, Okla.: PennWell.

IBBETSON, D. J. 2001. *A Historical Introduction to the Law of Obligations*, Oxford University Press.

INKPEN, A. C. & MOFFETT, M. H. 2011. *The Global Oil & Gas Industry: Management, Strategy & Finance*, Tulsa, Oklahoma, PennWell Books.

INSTITUTE OF RISK MANAGEMENT, L. 2002. A Risk Management Standard.

JAFFE, L. L. 1955. Judicial Review: Question of Fact. *Harv. L. Rev.*, 69, 1020-1056.

JAMALI, D. & MIRSHAK, R. 2007. Corporate Social Responsibility (CSR): Theory and Practice in a Developing Country Context. *Journal of business ethics*, 72, 243-262.

JAMES, F. J. 1937. Last Clear Chance: A Transitional Doctrine. *Yale L. J.*, 47, 704-723.

JOHNSON, E. S. & MATHERNE, C. T. 1999. Statutory and Contractual Indemnification and Forum Selection, Including the Oil Patch. *Tul. Mar. LJ*, 24, 85.

- JONES, M. A. J. 2010. *Clerk & Lindsell on Torts: Third Supplement to the Twentieth Edition. Supplement*, Sweet & Maxwell.
- JONES, P. M. 2003. The Drilling Contract: A Perspective from the Hard Knocks of Litigation No. 12. *Ann. Inst. on Min. L.*, 50, 294-303.
- JOSEPHSON, M. D. 2003. How Far Does the CAPL Travel - A Comparative Overview of the CAPL Model Form Operating Procedure and the AIPN Model Form International Operating Agreement. *Alta. L. Rev.*, 41, 1-28.
- JUOZAPAITIS, A., VAINIŪNAS, P., ZAVADSKAS, E. K., PECKIENE, A., KOMAROVSKA, A. & USTINOVICIUS, L. 2013. Modern Building Materials, Structures and Techniques - Overview of Risk Allocation between Construction Parties. *Procedia Engineering*, 57, 889-894.
- KAARBO, J. & BEASLEY, R. K. 1999. A Practical Guide to the Comparative Case Study Method in Political Psychology. *Political Psychology*, 20, 369-391.
- KACZOROWSKI, R. J. 1990. The Common-Law Background of Nineteenth-Century Tort Law. *Ohio St. LJ*, 51, 1127.
- KANGLES, N., ROGERS, R. B., ALLIDINA, Z. & HARRIS, C. 2011. Risk Allocation Provisions in Energy Industry Agreements: Are We Getting It Right. *Alta. L. Rev.*, 49, 339 - 367.
- KATSIVELA, M. 2007. Contracts: Force Majeure Concept or Force Majeure Clauses? *Uniform Law Review*, NS – Vol. XII, 101 - 120.
- KATZ, G. I. Contract Risk Allocation. Contractual Risk Transfer Seminar, 2001.
- KEELEY, M. C. 1999. *Estimating Damages in Patent Infringement Cases: An Economic Perspective* [Online]. New York: Cornerstone Research, Inc. Available: <https://www.cornerstone.com/Publications/Research/Estimating-Damages-in-Patent-Infringement-Cases>; accessed 28 November 2017.
- KINCAID, M. L. 1989. Recognizing an Implied Warranty That Professional Services Will Be Performed in a Good and Workmanlike Manner. *Mary's LJ*, 21, 685.
- KINNA, J. C. 1983. Investing in Developing Countries: Minimisation of Political Risk. *Journal of Energy & Natural Resources Law*, 1, 89-99.
- KIRALFY, A. R., LEWIS, A. D. E. & GLENDON, M. A. 2017. Common Law. *ENCYCLOPÆDIA BRITANNICA* [Online]. Available: <https://www.britannica.com/topic/common-law>; accessed 18 January 2018.
- KLEINBERGER, D. S. 1987. No Risk Allocation Need Apply: The Twisted Minnesota Law of Indemnification. *William Mitchell Law Review*, 13, 777-842.

- KNIGHT, F. H. 1921. Risk, Uncertainty and Profit. *New York: Hart, Schaffner and Marx.*
- KRIMSKY, S. 1992. *Social Theories of Risk*, Praeger.
- KRONMAN, A. T. 1979. Contract Law and Distributive Justice. *Yale L.J.*, 89, 472-512.
- LAM, J. 2014. *Enterprise Risk Management [Electronic Resource]: From Incentives to Controls*, Wiley.
- LAMBRECHTS, D. & BLOMQUIST, L. B. 2017. Political–Security Risk in the Oil and Gas Industry: The Impact of Terrorism on Risk Management and Mitigation. *Journal of Risk Research*, 20, 1320-1337.
- LAWSON, R. G. & SINGLETON, S. 2011. *Commercial Contracts: A Practical Guide to Standard Terms*, A&C Black.
- LEACOCK, S. J. 2006. The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic. *DePaul Business & Commercial Law Journal*, 5.
- LECESNE, B. 2011. Crude Decisions: Re-Examining Degrees of Negligence in the Context of the BP Oil Spill 2012 *Michigan State Law Review* 103, Loyola University New Orleans College of Law
- LEWISON, K. 2004. *The Interpretation of Contracts*, Sweet & Maxwell.
- LIOU, J. 2012. *Positive Rig Demand Steers 2013 Outlook* [Online]. Houston: International Association of Drilling Contractors. Available: <http://www.drillingcontractor.org/2012/novemberdecember-2012>; accessed 30 January 2018.
- LOOSEMORE, M. & MCCARTHY, C. 2008. Perceptions of Contractual Risk Allocation in Construction Supply Chains. *Journal of Professional Issues in Engineering Education and Practice*, 134, 95-105.
- LOWE, J. S. 1987. Analyzing Oil and Gas Farmout Agreements. *SW LJ*, 41, 759.
- LUCY, W. N. R. 1989. Contract as a Mechanism of Distributive Justice Comment. *Oxford J. Legal Stud.*, 9, 132-148.
- LUPTON, D. 1999. *Risk*, London, London: Routledge.
- MACMILLAN, C. A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999 (2000). *MLR*, 63, 721.
- MACMILLAN, F. 2000. *Risk, Uncertainty and Investment Decision-Making in the Upstream Oil and Gas Industry*. Aberdeen University.
- MALDONATO, M. & DELL'ORCO, S. 2011. *Natural Logic: Exploring Decision and Intuition*, Sussex Academic Press.

- MANAGEMENT, C. F. O. A. A. O. U. S. D. O. E. P. & COUNCIL, N. R. 2005. *The Owner's Role in Project Risk Management*, USA, National Academies Press.
- MARCH, J. G. & SHAPIRA, Z. 1987. Managerial Perspectives on Risk and Risk Taking. *Management Science*, 33, 1404-1418.
- MAREX. 2011. Supply Ship Collides with Transocean Drill Rig off Newfoundland. Available: https://www.maritime-executive.com/article/supply-ship-collides-with-transocean-drill-rig-off-newfoundland#gs.zK=_vBg; accessed 22 January 2018.
- MARTIN, A. T. 2004. Model Contracts: A Survey of the Global Petroleum Industry. *Journal of Energy & Natural Resources Law*, 22, 281-340.
- MARTIN, A. T. & PARK, J. J. 2010. Global Petroleum Industry Model Contracts Revisited: Higher, Faster, Stronger. *Journal of World Energy Law & Business*, 3, 4-43.
- MARTIN, P. H. 2010. BP Spill and the Meaning of Gross Negligence or Wilful Misconduct, *The. La. L. Rev.*, 71, 957.
- MASHAM, D. 1992. What Are Risk Management and Insurance? *Managing Risks of Investments in Developing Countries*, Industry and Energy Department Working Paper 9 -12.
- MASON, R. 2011. Transocean Blames BP's Oil Well Design for Gulf of Mexico Disaster. *The Telegraph*, 22 June 2011.
- MCCORMICK, R. 2010. *Legal Risk in the Financial Markets*, Oxford University Press on Demand.
- MCDUGALL, R. 2016. Revisiting the Penalties Doctrine: *Paciocco v ANZ*. *The Commercial Law Association of Australia*. Sydney, NSW.
- MCGREGOR, H. 2003. *McGregor on Damages*, U.K., Sweet & Maxwell.
- MCKENDRICK, E. 1995. *Force Majeure and Frustration of Contract*, London, Lloyds of London Press.
- MERCIER, T., KANE, J. & NAMMOUR, S. 2014. Drafting Canadian Oilfield Master Service Agreements: An Overview of Key Clauses and Market Trends. *Alta. L. Rev.*, 52, 245.
- MERKIN, R. (ed.) 2000. *Privity of Contract: The Impact of the Contracts (Right of Third Parties) Act 1999*, Oxford: Informa Law from Routledge.
- METCALF, S. K. 2010. Contract: What Is "Performance in A Good and Workmanlike Manner"? Available: <http://mmmsk.com/contract-what-is-performance-in-a-good-and-workmanlike-manner/> accessed 13 October 2017.
- MEYERS III, R. L. & PERELMAN, D. A. 1988. Risk Allocation Through Indemnity Obligations in Construction Contracts. *SCL Rev.*, 40, 989.

- MIAN, M. A. 2011. *Project Economics and Decision Analysis: Deterministic Models*, PennWell Books.
- MILDWATERS, K. 2016. Oil and Gas: Commercial Contracts Matrix Dundee, UK: University of Dundee, Scotland, Unpublished Work.
- MILLAGE, A. 2007. Risk and Reward. *The Internal auditor*, 64, 6.
- MILLER, R., BURKILL, G., BIRSS, C. & CAMPBELL, D. 2011. *Terrell on the Law of Patents*, Sweet & Maxwell.
- MITRE. 2013. *Risk Mitigation Planning, Implementation, and Progress Monitoring* [Online]. USA: The MITRE Corporation. Available: <http://www.mitre.org/publications/systems-engineering-guide/acquisition-systems-engineering/risk-management/risk-mitigation-planning-implementation-and-progress-monitoring> accessed 13 March 2016.
- MOOMJIAN JR, C. Drilling Contracts: Pursuit of an Equitable and Balanced Relationship Between Operators and Contractors. SPE/IADC Drilling Conference, 1989. Society of Petroleum Engineers.
- MOOMJIAN, C. A. Drilling Contract Historical Development and Future Trends Post-Macondo: Reflections on a 35 Year Industry Career. IADC/SPE Drilling Conference and Exhibition, 2012. Society of Petroleum Engineers.
- MOOMJIAN, C. A. 1999. Contractual Insurance and Risk Allocation in the Offshore Drilling Industry. *Drilling Contractor*, January/February.
- MOOMJIAN, C. A. 1999. Contractual Insurance and Risk Allocation in the Offshore Drilling Industry. *Drilling Contractor*, March/April.
- MOOMJIAN, C. A. 1999. Contractual Insurance and Risk Allocation in the Offshore Drilling Industry. *Drilling Contractor*, May/June.
- MORRISON, G. M. 1958. Contractual Liability Coverage - Some Practical Aspects of Hold Harmless Agreements and Contracts of Indemnity. *Ins. Counsel J.*, 25, 198-201.
- MUFSON, S. 2014. BP's 'gross negligence' Caused Gulf oil spill, Federal Judge Rules. *The Washington Post*, 4 September 2014.
- MULHERON, R. 2016. *Principles of Tort Law*, Cambridge University Press.
- MURPHY, J. 2010. *The Law of Nuisance*, Oxford University Press.
- MURPHY, J. & WITTING, C. 2012. *Street on Torts*, Oxford University Press, UK.
- NEWMAN, R. H. 1980. Doctrine of Privity of Contract: The Common Law and the Contracts (Privity) Act 1982, *The Auckland UL Rev.*, 4, 339.
- OAKLAND, W. H. & TESTA, W. A. 1996. State-Local Business Taxation and the Benefits

Principle. *Economic Perspectives-Federal Reserve Bank of Chicago*, 20, 2-18.

OGILVIE, J. & DOE, J. 2009. *The IAD Drilling Contract: SeaDrill v OAO Gazprom* [Online]. London: Herbert Smith LLP. Available: <https://www.lexology.com/library/detail.aspx?g=181f42c1-4755-465d-af61-7dd9ac94f51c>; accessed 28 January 2018.

ORGANISATION, I. S. 2009. ISO/IEC Guide 73.

OSMUNDSEN, P. 2015. Optimal Strategies for Rig Procurement. *Journal of Petroleum Science and Engineering*, 126, 11-15.

OSMUNDSEN, P., SORENES, T. & TOFT, A. 2009. Oil Service Contracts: New Incentive Schemes to Promote Drilling Efficiency. *USAEE-IAEE WP 09-028* [Online]. Available: <https://ssrn.com/abstract=1517194>

OSMUNDSEN, P., SØRENES, T. & TOFT, A. 2008. Drilling Contracts and Incentives. *Energy Policy*, 36, 3138-3144.

OSMUNDSEN, P., TOFT, A. & DRAGVIK, K. A. 2006. Design of Drilling Contracts—Economic Incentives and Safety Issues. *Energy Policy*, 34, 2324-2329.

PALMER, N. & YATES, D. 1981. The Future of the Unfair Contract Terms Act 1977. *The Cambridge Law Journal*, 40, 108-134.

PALMER, N. E. 1983. The Supply of Goods and Services Act 1982, [Legislation] *Modern Law Review*, Vol. 46, 619-631.

PALUMBO, A. 2014. *Modern Law of Sales in the United States*, Utrecht, Eleven International Publishing.

PASTERNAK, A. 2013. The Rumsfeld Uncertainty Principle.

PAULUS, J. R. M., DIRK J. 1999. Force Majeure - Beyond Boilerplate Petroleum Law Edition. *Alta. L. Rev.*, 37, 302-315.

PEEL, E. 2011. *Treitel The Law of Contract*, London, U.K., Sweet & Maxwell.

PEEL, E. & GOUDKAMP, J. 2014. *Winfield and Jolowicz on Tort*, London, Sweet & Maxwell.

PICKVANCE, C. 2005. The Four Varieties of Comparative Analysis: The Case of Environmental Regulation. *Conference on Small and large-N Comparative Solutions*. University of Sussex, U.K.: University of Sussex, U.K.

PICKVANCE, C. G. 2001. Four Varieties of Comparative Analysis. *Journal of Housing and the Built Environment*, 16, 7-28.

POLKINGHORNE, M. 2012. Exclusion Clauses: Navigating the Minefield. *Oil, Gas & Energy Law Journal (OGEL)*, 10.

POLLOCK, S. F. 1950. *Pollock's Principles of Contract*, London, London: Stevens.

- POSNER, R. A. 1979. Some Uses and Abuses of Economics in Law. *The University of Chicago Law Review*, 46, 281-306.
- POSNER, R. A. 1986. *Economic Analysis of Law*, Little, Brown and Company.
- POTAMKIN, L., NORMAN L. 1943. Indemnification Against Tort Liability--The Hold Harmless Clause--Its Interpretation and Effect Upon Insurance. *U. Pa. L. Rev.*, 92, 347-371.
- PROSSER, W. L. & KEETON, P. 1984. *Prosser and Keeton on Torts*, West Publishing.
- PUGH, W. W. 1998. The IADC Offshore Drilling Contract. *Oil and Gas Development on the Outer Continental Shelf, Paper*, (Rocky Mtn Min L Fdn, 1998) §8.
- PWC. 2017. *Technology Risk* [Online]. Online: PwC Network. Available: <https://www.pwc.co.uk/careers/student-jobs/work-for-us/graduateopportunities/technology/digital-trust.html>; accessed 6 December 2017.
- QUARTZ, S. R. 2009. Reason, Emotion and Decision-Making: Risk and Reward Computation with Feeling. *Trends in cognitive sciences*, 13, 209-215.
- RAMMERSTORGER, M. 2009. Risk Acceptance and Regulatory Risk. *Competition & Reg. Network Indus.*, 10, 235.
- RANKIN, M. D. & RICHARDSON, D. R. 1983. The Offshore Drilling Contract-Operator and Contractor Perspectives. *IADC/SPE 1983 Drilling Conference*. New Orleans, Louisiana: Society of Petroleum Engineers.
- REDFEARN, R. J. 2005. Oilfield Anti-Indemnity Acts and Their Impact on Insurance Coverage: A Comparative Analysis. *Insurance Journal West Magazine* [Online]. Available: <http://www.insurancejournal.com/magazines/features/2005/08/22/59608.htm>; accessed 23 May 2016).
- REINECKE, M. F. B. 2013. *Insurable Interest Regspraak*.
- RENN, O. 1992. Concepts of Risk: A Classification.
- REYNOLDS, F. 2016. *Unidentified Principals in Common Law*, Oxford, Oxford University Press.
- RICHARDSON, M. 1990. Contract Law and Distributive Justice Revisited. *Legal Stud.*, 10, 258-270.
- RIECKEN, G. S. 2010. The Duty to Defend under Non-Insurance Indemnity Agreements: Crawford v. Weather Shield Manufacturing, Inc. and Its Troubling Consequences for Design Professionals. *Santa Clara L. Rev.*, 50, 825-892.
- RIGZONE. 2017. *How Does Blowout Control Work?* [Online]. Rigzone. Available: http://www.rigzone.com/training/insight.asp?insight_id=300&c_id=1; accessed 27 October 2017.

- RIZZO, M. J. 1980. The Mirage of Efficiency. *Hofstra Law Review*, 8, 7.
- ROBERTS, P. 2010. *Joint Operating Agreements: A Practical Guide*, Globe Law and Business.
- ROE, T. 2000. Contractual Intention under Section 1 (1)(b) and 1 (2) of the Contracts (Rights of Third Parties) Act 1999. *The Modern Law Review*, 63, 887-894.
- RUMSFELD, D. 2011. *Known and Unknown: A Memoir*, Penguin.
- SALACUSE, J. W. 2013. *The three laws of international investment: national, contractual, and international frameworks for foreign capital*, Oxford University Press.
- SANCHEZ, L. 2006. Charting the Chaotic Offshore Waters: The Validity of Contractual Indemnity Provisions Pertaining to Injuries Sustained Offshore. *Tul. Mar. LJ*, 31, 177.
- SAPPIDEEN, C. & VINES, P. (eds.) 2011. *Fleming's The Law of Torts*, Australia: Thomson Reuters (Professional) Australia Limited.
- SARACENI, P. & SUMMERS, N. 2016. Reviewing Knock for Knock Indemnities: Risk Allocation in Maritime and Offshore Oil and Gas Contracts. *Austl. & NZ Mar. LJ*, 30, 28.
- SCHILLING, E. T. 2001. Demette v. Falcon Drilling Co.: The Sinking Ship of Fifth Circuit Precedent Construing the Outer Continental Shelf Lands Act and Maritime Law. *Tulane Law Review*, 76:1785.
- SCHLEIFSTEIN, M. & THOMPSON, R. 2013. *BP Oil Spill Trial: Blowout Preventer on Macondo Well Had Dead Battery, Miswired Solenoid, Expert Testifies* [Online]. NOLA.com | The Times-Picayune Available: http://www.nola.com/news/gulf-oil-spill/index.ssf/2013/03/bp_oil_spill_trial_blowout_pre.html accessed 28 October 2017.
- SEALY, L. S. 1999. *Commercial Law: Text, Cases and Materials*, London; Edinburgh, London; Edinburgh: Butterworths.
- SEELY, H. 2010. *Pieces of intelligence: The Existential Poetry of Donald H. Rumsfeld*, Simon and Schuster.
- SERVICES, C. G. T. 2017. *Environmental Risk: Defined* [Online]. Online: Crawford Global Technical Services. Available: <https://crawfordgts.com/services/environmental-risk/environmental-risk-defined.aspx>; accessed 7 December 2017.
- SEWARD, R. C. 2002. *The Role of Protection and Indemnity (P&I) Clubs* [Online]. Tindall Riley (Britannia) Ltd. Available: <http://www.intertanko.com/upload/presentations/protection%20%20indemnity%20HK%202002.pdf> accessed 27 November 2017.
- SHAPIRO, S. & GLICKSMAN, R. 2002. *Risk Regulation at Risk: Restoring a Pragmatic Approach*, Stanford University Press.
- SHEEHAN, M. F. 2002. Duty to Defend: General Principles. Available: <http://www.fasken.com/files/Publication/a85a0036-270f-4a37-9e88->

1e957562aa38/Presentation/PublicationAttachment/de6e0d83-acfe-4577-86fd-21341d50cb16/DUTY_TO_DEFEND_GENERAL_PRINCIPLES.pdf; accessed 15 February 2017.

SHISHIDO, Z. 1987. Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture. *HASTINGS LJ*, 39, 63.

SHORT, J. F. 1984. The Social Fabric at Risk: Toward the Social Transformation of Risk Analysis. *American Sociological Review*, 49, 711-725.

SICHONE, O. & GIDDENS, A. 2002. Runaway World: How Globalisation is Reshaping Our Lives. JSTOR.

SKJONG, R. 2005. Etymology of Risk. *Classical Greek origin-Nautical expression -Metaphor for "difficulty to avoid the sea"*.

SMITH, S. A. & ATIYAH, P. S. 2006. *Atiyah's Introduction to the Law of Contract*, OUP Oxford.

SOANES, C. & HAWKER, S. 2006. Compact Oxford English Dictionary for Students. United Kingdom, Oxford: Oxford University Press.

SPRINGER, J. A. 1987. Releases: An Added Measure of Protection from Liability Comment. *Baylor L. Rev.*, 39, 487-522.

STONE, R. 1996. *Law of Agency*, London, Cavendish.

STYLES, S. 2007. Joint Operating Agreements. in *Gordon, G., Paterson, J. & Usenmez, E. (eds.) Oil and Gas Law: Current Practice and Emerging Trends*. Dundee: Dundee University Press, pp. 359 -409.

SWADLING, W. 1995. The Judicial Construction of Force Majeure Clauses. *Force Majeure and Frustration of Contract*, 3-19.

TADE, J. B. 1987. Texas and Louisiana Anti-Indemnity Statutes as Applied to Oil and Gas Industry Offshore Contracts, *The. Hous. L. Rev.*, 24, 665.

TALEB, N. N. 2007. *The Black Swan: The Impact of the Highly Improbable*, Random House.

TEACHER, L. November 2013. Negligence Breach Lecture. [online]. Available: <http://www.lawteacher.net/lecture-notes/tort-law/negligence-breach-lecture.php?cref=1>; accessed 25 May 2016.

TEAGUE, J. U. New Concepts in Drilling Contractor-Operator Relationships. American Petroleum Institute.

THOMAS, T. A. 2004. Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process. *San Diego Law Review*, 41.

- THOMSEN, C., DARRINGTON, J., DUNNE, D. & LICHTIG, W. 2009. Managing Integrated Project Delivery. *Construction Management Association of America (CMAA)*, McLean, VA, 105.
- THORNSJO, D. O. & HASAN, N. B. 2007. Contractual Risk Management: Considerations When Allocating Third-Party Liability Risk Available: <http://www.olwklaw.com/docs/07-01-16%20MDLA%20Seminar%20Risk%20Management%20Materials.pdf>; accessed 14 March 2016.
- TREITEL, G. H. 2004. *Frustration and Force Majeure*, Sweet & Maxwell.
- TRIANSTIS, G. G. 2000. Unforeseen Contingencies. Risk Allocation in Contracts. *Encyclopedia of Law and Economics*, 3, 100-116.
- UKESSAYS 2013. Political and Economic Risk Analysis Case Study Macedonia Economics Essay. November 2013 ed. Online: UK Essays.
- VALIPOUR, A., MOHAMMADI, F., YAHAYA, N., SARVARI, H. & NOOR, N. M. 2014. Identification and Evaluation of Risk Allocation Criteria and Barriers: A Malaysian Public Private Partnership Project Case Study. *Journal of Applied Sciences*, 14, 2023.
- VAN DER MERWE, S. 1970. The Concept of Insurance and the Insurance Contract. *The Comparative and International Law Journal of Southern Africa*, 149-167.
- VIG, N. J. & BRUER, P. J. 1982. THE COURTS AND RISK ASSESSMENT¹. *Review of Policy Research*, 1, 716-727.
- WALLACH, G. 1979. Excuse Defense in the Law of Contracts: Judicial Frustration of the UCC Attempt to Liberalize the Law of Commercial Impracticability. *Notre Dame Law.*, 55, 203.
- WARNE, P. & WESTBROOK, B. 1994. Indemnity Clauses: Need for Clear Wording. *International Insurance Law Review*, 2(8), 129-131.
- WARREN, T. The Operator-Contractor Relationship – Contract Changes, 1982 to 1984. SPE/IADC Drilling Conference, 1985. Society of Petroleum Engineers.
- WEINRIB, E. J. 1991. Corrective Justice Symposium: Corrective Justice and Formalism: The Care One Owes One's Neighbors. *Iowa L. Rev.*, 77, 403-426.
- WEINTRAUB, E. R. 1993. 'Neoclassical Economics' In: HENDERSON, D. R. (ed.) *The Concise Encyclopedia of Economics*. Library of Economics and Liberty: <http://www.econlib.org/library/Enc1/NeoclassicalEconomics.html>; accessed 14 June 2016.
- WHINSTON, M. D. 2001. Assessing the Property Rights and Transaction – Cost Theories of Firm Scope. *The American Economic Review*, 91, 184-188.
- WHITE, A. 1997. Caveat Vendor? A Review of the Court of Appeal Decision in *St Albans City and District Council v International Computers Limited*. *The Journal of Information, Law and*

Technology (JILT), 3.

WHITE, H. H. 1996. Winding Your Way Through the Texas Oilfield Anti-Indemnity Statute, the Fair Notice Requirements and Other Indemnity Related Issues. *S. Tex. L. Rev.*, 37, 161.

WHITFIELD, S. 2017. *Macondo Contractor/Operator Gaps Identified by CSB* [Online]. USA: Society of Petroleum Engineers. Available: <https://www.spe.org/en/ogf/ogf-article-detail/?art=2637>; accessed 31 October 2017.

WILLIAMS, J. & EVANS, T. 2016. Knock-for-Knock Clauses. *The Journal of World Energy Law & Business*, 9, 303-305.

WILLIAMS, S. W. J. & SHERRIN, C. H. 2002. *Williams on wills. Vol. 1., Vol. 1*, London, Butterworths.

WILSON, L. Contract and Benefits for Third Parties” (1987). *Syd L Rev.*, 11, 230.

WILSON, S. & BONE, S. 2002. Businesses, Standard Terms and the Unfair Contract Terms Act 1977. *J. Obligations & Remedies*, 1, 29.

YEO, T. When Do Third Party Rights Arise Under the Contracts (Rights of Third Parties) Act 1999 (UK)?” (2001). *Singapore Academy of Law Journal*, 13, 34.

YOUNGBLOOD, D. H., FLOCOS, P. N. & DUROCHER, S. 2010. Risk Transfer Provisions in Commercial Contracts: Strategies for Negotiating Indemnity, Insurance and Limitation of Liability Clauses. Available: <http://www.traffordpub.com>; accessed 10 February 2017.

ZAHARI, W. Z. 2017. A Comparative Analysis on the Enforceability of Knock-for-Knock Indemnities in Thailand and the United Kingdom.